IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 540

JULIA ROSADO, LYDIA HERNANDEZ, MARJORIE MILEY, SOPHIA ABROM, RUBY GATHERS, LOUISE LOWMAN, EULA MAE KING, CATHRYN FOLK, ANNIE LOU PHILLIPS, and MARJORIE DUFFY, individually, on behalf of their minor children, and on behalf of all other persons similarly situated,

Petitioners,

—against—

GEORGE K. WYMAN, individually and in his capacity as Commissioner of Social Services for the State of New York, and the DEPARTMENT OF SOCIAL SERVICES FOR THE STATE OF NEW YORK,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

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In the

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Julia Rosado, Lydia Hernandez, Marjorie Miley, Sophia Abrom, Ruby Gathers, Louise Lowman, Eula Mae King, Cathryn Folk, Annie Lou Phillips, and Marjorie Duffy, individually, on behalf of their minor children, and on behalf of all other persons similarly situated,

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BRIEF FOR PETITIONERS

Opinions Below

The opinion of the three-judge District Court dismissing the constitutional claim, dissolving itself, and remanding the case to the single judge is set forth in the joint appendix at 133.[1]

[1] Citations to the joint appendix will appear as ( ). Citations to the appendix to this brief will appear as (A).

The revised opinions of the one-judge District Court granting the preliminary injunction, summary judgment and the permanent injunction are set forth at 167. The District Court opinions have not been reported to date.

The opinion of the Court of Appeals affirming the dissolution of the three-judge court, vacating both injunctions, and reversing summary judgment is set forth at 215, and is reported at 414 F. 2d 120.

Jurisdiction

The judgment of the Second Circuit Court of Appeals affirming the dissolution of the three-judge court, vacating the preliminary and permanent injunctions and reversing the summary judgment was entered on July 16, 1969 (259). The petition for certiorari was filed on August 30, 1969 and certiorari, along with a motion to advance, was granted on October 13, 1969. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Statutes and Regulations Involved

Title 42, United States Code, Section 602(a)(23) provides:

> Sec. 602(a) A State plan for aid and services to needy families with children must
>
> • • • • •
>
> (23) provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid

paid to families will have been proportionately adjusted.

45 C.F.R. §233.20(a)(2)(ii), 34 Fed. Reg. 1394 (1969) provides:

> In the AFDC plan, provide that by July 1, 1969, the State's standard of assistance for the AFDC program will have been adjusted to reflect fully changes in living costs since such standards were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted. In such adjustment a consolidation of the standard (i.e., combining of items) may not result in a reduction in the content of the standard. In the event the State is not able to meet need in full under the adjusted standard, the State may make ratable reductions in accordance with paragraph (a)(3)(viii) of this section. Nevertheless, if a State maintains a system of dollar maximums, these maximums must be proportionately adjusted in relation to the updated standard.

45 C.F.R. §233.20(a)(3)(viii), 34 Fed. Reg. 1394 (1969) provides:

> . . . that payment will be based on the determination of the amount of assistance needed and that, if full individual payments are precluded by maximums or insufficient funds, adjustments will be made by methods applied uniformly statewide.

Ch. 184, L. 1969 (March 31, 1969) of the State of New York provides in pertinent part:

Section 1. Legislative findings and purpose. The spiraling rise of public assistance rolls and the expenditures therefor, despite a high level of general prosperity and an unprecedented high rate of employment, have become matters of primary social and economic concern to the people of the state of New York. The escalation continues, both in numbers of people requesting assistance and in the costs thereof, despite predicted continuance of general prosperity and high employment.

* * * * *

The legislature therefore finds and declares that it is necessary and in the best interests of the people of the state to establish a schedule of maximum monthly grants and allowances of public assistance for the city of New York social services district and a schedule of maximum monthly grants and allowances of public assistance for all other local social services districts in the state, based upon the costs of delivering the needs of public assistance recipients in the respective social services districts of the state, and to make other remedial changes provided for in this chapter.

* * * * *

§5. Such law is hereby amended by adding a new section, to be section one hundred thirty-one-a, to read as follows:

§131-a. Maximum monthly grants and allowances of public assistance. 1. Any inconsistent provision of this chapter or other law notwithstanding, social services officials shall provide home relief, veteran assistance, old age assistance, assistance to the blind, aid to the disabled and aid to dependent children, to eligible needy persons who constitute or are members

of a family household, in monthly or semi-monthly allowances or grants in accordance with standards established by the regulations of the department, but not in excess of the schedules included in this section, less any available income or resources which are not required to be disregarded by other provisions of this chapter. Such schedules shall be deemed to make adequate provision for all items of need in accordance with the provisions of section one hundred thirty-one, exclusive of shelter and fuel for heating, for which two items additional provision shall be made by the social services districts in accordance with the regulations of the department.

2. The following schedule of maximum monthly grants and allowances shall be applicable to the social services district of the city of New York:

Number of Persons in Household

One	Two	Three	Four	Five	Six	Seven
$70	$116	$162	$208	$254	$297	$340

For each additional eligible needy person in the household there shall be an additional allowance of forty-three dollars monthly.

3. The following schedule of maximum monthly grants and allowances shall be applicable to all other social services districts:

Number of Persons in Household

One	Two	Three	Four	Five	Six	Seven
$60	$101	$142	$183	$224	$257	$290

For each additional eligible needy person in the household there shall be an additional allowance of thirty-three dollars monthly.

4. Any such social services district shall be permitted, with the approval of the commissioner, to adopt a schedule of monthly grants and allowances for lesser amounts than established by the regulations of the department, subject to the above limitations, for all items of need, exclusive of shelter and fuel for heating, if on application to the department made by the social services official thereof with the approval of the appropriate local legislative body, such district establishes to the commissioner that in such district the total cost of the items required to be provided and reflected in the schedule, actually is less than the schedule of monthly grants and allowances established by the regulations of the department.

5. In order that the legislature may, from time to time, consider adjustments to reflect changes in the cost of living, the board and the department shall annually make an appropriate report to the governor and the legislature, which report shall include the recommendations of the board and the department relating thereto.

6. Notwithstanding any other provisions of this chapter or other law, a social services official may make provision for the replacement of necessary furniture and clothing for persons in need of public assistance who have suffered the loss of such items as the result of fire, flood or other like catastrophe, provided provision therefor cannot otherwise be made.

Ch. 411, L. 1969 (May 9, 1969) of the State of New York provides:

Section 1. Subdivision four of section one hundred thirty-one-a of the social services law, as added by chapter one hundred eighty-four of the laws of nineteen hundred sixty-nine, is hereby repealed, and a new subdivision four is hereby inserted in lieu thereof, to read as follows:

4. Provided it accords with federal requirements, the regulations of the department shall provide that the commissioner, with respect to any social services district to which subdivision three applies, may promulgate a schedule of monthly grants and allowances for greater or lesser amounts than established by the regulations of the department applicable to such district, but not to exceed the maximums prescribed by subdivision two, for all items of need exclusive of shelter and fuel for heating, if it is established that in such district the total cost of the items included in the schedule applicable to such district actually is more or less, as the case may be, than the cost thereof reflected in such schedule. A social services official may, with the approval of the appropriate local legislative body, make application to the department for the promulgation of a schedule pursuant to this subdivision.

Title 42, United States Code, Section 1983 provides:

> Every person who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable . . . [in a] suit in equity, or other proper proceeding for redress.

Title 28, United States Code, Section 1343 provides:

Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * * * *

(3) To redress the deprivation, under color of any State . . . statute . . . of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

Title 28, United States Code, Section 1331 provides:

Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

Title 28, United States Code, Section 2281, provides:

Injunction against enforcement of State statute; three-judge court required

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State

statute by restraining the action of any officer of such State in the enforcement or execution of such statute ... shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

Title 28, United States Code, Section 2284, provides:

Three-judge district court; composition; procedure

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

Questions Presented

In January, 1968 Congress mandated that states maintain their efforts in AFDC in light of inflation through a cost of living adjustment of the amounts used to determine the needs of individuals and any maximums imposed on the amount of aid paid. In March, 1969, New York reformulated its standard of need in order to reduce its efforts in AFDC in 1969-1970. Petitioners, critically affected by this welfare cutback, sued in a United States District Court to adjudicate the validity under the Constitution and the Social Security Act of this reduction of effort. The questions before this Court are whether:

1. Section 402(a)(23) of the Social Security Act forbids New York from eliminating or reducing the amounts used to determine the needs of individuals in order to curtail its efforts in AFDC?

2. A United States District Court is without jurisdiction, pendent or independent, timely to adjudicate this question of validity under paramount federal law.

Statement of the Case

New York, along with the 49 other states,[2] participates in the federal Aid to Families with Dependent Children program (AFDC), established in 1935 as a long range inter-governmental endeavor to provide for the economic security and well-being of needy children deprived of parental support by virtue of the death, incapacity or ab-

[2] The District of Columbia, Puerto Rico, Guam and the Virgin Islands also participate in the AFDC program.

sence of a parent. Social Security Act of 1935, §§401 *et seq.*, 42 U.S.C. §§601 *et seq.* It is a residual assistance program, meeting such basic needs as shelter, food, clothing, educational necessities and home furnishings, when all other resources and income, including the benefits of other programs, have been exhausted. 42 U.S.C. §602(a)(7). Under this scheme of cooperative federalism, the federal government now bears the major share of financial responsibility under an open-ended appropriation in exchange for state administration in conformity with the federal statutory commands essential for attainment of national program objectives. Section 402(a)(1)-(23), 42 U.S.C. §602 (a)(1)-(23).

These fundamental program objectives long have recognized and accepted the wide variations among the several states in wealth, living costs, social and economic conditions; the most recent of the federal statutory conditions continues this tradition. Relying upon each state's own standard of need and levels of payment then in effect, it provides:

"A State plan . . . must

• • • • •

(23) provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted." 42 U.S.C. 602(a)(23) (§402(a)(23) of the Social Security Act of 1935, as amended).

This case puts in issue whether the State of New York, along with other states, must comply with this federal mandate.

Central to the AFDC program in all states is the standard of need (i.e., the minimal amounts for food, clothing and other necessities) used to determine the amount of aid to be provided "needy" families with dependent children. Prior to the legislative welfare cuts of 1969, New York's AFDC standard of need and level of benefits were administratively determined "in accordance with standards of public health in the community with due regard for variations in costs from time to time and between localities," New York Social Services Law §131(3). The standard was state-wide, with small difference for minor variations in utility costs. It included as part of the recurring grant for all recipients monetary amounts for food, utilities, household supplies, and personal incidentals, which varied with the size of family and the age of the oldest child;[3] New York's standard also included as critical supplements to the semi-monthly grant monetary amounts for major items of clothing[4] and home furnishings,[5] medically-dictated diets[6] and telephones,[7] transportation,[8] educational necessities,[9]

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[3] 18 N.Y.C.R.R. §352.4, repealed as of July 1, 1969, and replaced by a new section. (The same history applies to the other repealed regulations cited herein.)

[4] 18 N.Y.C.R.R. §352.4(c), repealed.

[5] 18 N.Y.C.R.R. §352.5(j), repealed.

[6] 18 N.Y.C.R.R. §352.4(b)(7), (8), (9), repealed.

[7] 18 N.Y.C.R.R. §352.5(i), repealed.

[8] 18 N.Y.C.R.R. §352.5(p), repealed.

[9] 18 N.Y.C.R.R. §352.5(d), repealed.

school lunches,[10] expenses incident to infancy,[11] and rent,[12] the latter being paid at cost within allowable limits. Often representing a substantial portion of the amount of aid furnished, these supplements were furnished on a specific occasion of need or recurringly in accordance with individual and family requirements, save for a flat quarterly grant in New York City of $25 per family member for clothing and home furnishings.[13] All of these amounts comprised the state-wide standard of need for which 50 percent federal matching funds was afforded under New York's AFDC plan.[14] The standard was repriced and adjusted annually pursuant to an administrative study of living costs in May of each year.[15]

In lieu of the 1969 adjustment for the inflationary spiral since May, 1968, the New York Legislature in March, 1969, abolished the administrative need standard and established two statutory schedules "of maximum monthly grants and allowances," applicable respectively to New York City and the rest of the State. Based upon "the spiraling rise of public assistance rolls and the expenditures therefor,"[16] a new standard of need was formulated to accomodate a 13

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[10] 18 N.Y.C.R.R. §352.5(d).

[11] 18 N.Y.C.R.R. §352.4(c)(iv), repealed.

[12] 18 N.Y.C.R.R. §352.4(e), repealed.

[13] New York obtained a waiver from H.E.W. under 42 U.S.C. §1315 of the Federal requirements of state-wide uniformity.

[14] 42 U.S.C. §1318; H.E.W. Handbook of Public Assistance Administration, Pt. V, §2233 (hereafter cited as H.E.W. Handbook). New York State and New York City share the remaining costs equally. N.Y. Soc. Serv. Law §153(i)(d).

[15] See N.Y. Soc. Serv. Law §131(3); 18 N.Y.C.R.R. §352.1(a), repealed.

[16] L. 1969, Ch. 184, §1 (March 31, 1969).

percent cut in New York's AFDC annual budget for projected expenditures based upon the then prevailing standard of need. The correspondingly reduced 25 percent local and 50 percent federal matching shares, heavily relied on in the State budget, reduced New York's overall effort in AFDC by approximately 75 million dollars for fiscal year 1970 (212). This severe retreat is accomplished by contraction and reduction of the standard of need which, it is decreed, "shall be deemed to make adequate provision for all items of need . . . exclusive of shelter and fuel for heating. . . ." New York Social Services Law §131-a(1). Excluded entirely from the revised standard are the differential amounts for the greater nutritional, social and educational needs of older children, particularly teenage children, and, with the exception of rent and fuel, *all* of the amounts long afforded as supplements to the regular grant, including the flat $25 quarterly per person allowance in New York City. As the Governor summarized the new standard,

> "My proposals for limiting public assistance and care payments . . . will include elimination of the nonrecurring special need grants [and] reduction of public assistance eligibility standards . . . ." [Executive Budget for Fiscal Year April 1, 1969 to March 31, 1970 at m 14, Doc. No. 48.]

The techniques used produced even greater reductions for the other urban counties outside New York City, including those long grouped with the City as having identical living costs. The newly established five to ten dollar monthly differentials per person were no longer attributable to minor variations in utility cost, but, the Respondent

averred, to the sheer numbers of AFDC families in New York City and the stress of city life (99-100).

The revised standard was signed into law on March 31, 1969, as Section 131-a, New York Social Services Law, and thereupon became a part of New York's federal AFDC plan, under which federal monies are advanced quarterly. The Legislature adjourned soon thereafter until the next regular session in 1970 and the new schedules were to be unconditionally and promptly implemented by the state administrator so as to be fully operative throughout the state by July 1, 1969.

Pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1343(3) and (4), and 28 U.S.C. §1331, this lawsuit was instituted by families dependent on AFDC for the rudiments of life to adjudicate under federal law in a federal district court the validity *vel non* of the reduced statutory schedules and to enjoin the Respondent state administrator from implementing them throughout the state. The gravamen of the complaint was that the amounts now used "to determine the needs of individuals" and levels of payments in New York's AFDC plan do not reflect changes in living costs and thereby offend Section 602(a)(23); and, that the further reduced standard for recipients residing in the metropolitan urban counties outside New York City, with at least comparable living costs, violate the constitutional guarantee of equal protection of the laws and the Social Security Act guarantee of uniformity in standards of need and levels of payments within a state. 42 U.S.C. §602(a)(1); 45 C.F.R. §233.20(a)(2)(iii), (viii); 34 Fed. Reg. 1394 (1969).

Initially "all parties agree[d] that time is of the essence" (75) and New York quickly moved to convene a three-judge

court (26). The United States and the Department of Health, Education and Welfare (H.E.W.), immediately notified of the case by telegrams (27, 28), declined District Judge Weinstein's invitation to intervene or to file an *amicus* brief[17] and vigorously opposed New York's motion to join H.E.W. as a party defendant (29, 35). The motion was denied since plaintiffs "do not seek to cut off federal funds" (34) and since H.E.W.'s interest and position can be "made known to the Court, by the filing of an *amicus* brief" (35). H.E.W. along with the City of New York and Nassau County, did become parties *amici curiae* in the District Court, and interposed no opposition to the course of proceedings in that Court. The views of the federal agency, as expressed in a recent regulation under 402(a)(23) and a brief explicating at length the statute and regulation, were before the District Court.[18] A three-judge court was convened as "the appropriate vehicle for speedily resolving all the issues in this case so that uncertainty may be eliminated as soon as possible" (75).

Testimony of state and city welfare officials, along with numerous affidavits of medical and social work experts, public and private, at initial hearings established that

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[17] H.E.W. agreed to answer specific questions if necessary (30).

[18] In two other decided cases in which the interpretation of §402(a)(23) was at issue, H.E.W. submitted *amicus* briefs supporting the State. *Lampton* v. *Bonin*, —— F. Supp. ——, Civ. No. 68-2092-E (E.D. La. July 15, 1969); *Jefferson* v. *Hackney*, —— F. Supp. ——, Civ. No. CA-3-3012-B (N.D. Tex. 1969). In *Lampton* a divided court (2–1) upheld H.E.W.'s position that Louisiana complied with §402(a)(23), while a unanimous court in *Jefferson* held that Texas' cutbacks were not in compliance. Both cases are now being appealed to this Court. The H.E.W. brief in *Lampton* was before the District Court in this case. Both briefs are set out in the appendix to this brief. They will be hereafter cited as H.E.W. *Lampton* (or *Jefferson*) Brief A- .

AFDC grants in New York before the reduction barely allowed for life at subsistence level compatible with health and decency (38, 56);[19] that high infant mortality, malnutrition, stunted growth and educational performance were then common place among AFDC families in New York;[20] and that the widespread reductions in current payments therefore seriously threatened physical and mental well-being and development and family life.[21] The evidence also showed that the plaintiff families would suffer reductions ranging from 3% to 38% (184) and would be denied entirely critical allowances for transportation, diets, telephones necessitated by tuberculosis and other physical afflictions.[22] It was further revealed that steps toward implementation, then underway, would take at least six to eight weeks and might at some unspecified point be irreversible (278, 279, Tr. 146, 147). A provisional order restraining such irreversible steps was entered (78).

Both parties on April 28, 1969 filed cross-motions for summary judgment on the equal protection and federal statutory claim (86, 120), supported by extensive exhibits, affidavits, official documents, testimony and briefing bearing upon the character and impact of the proposed reduction and the spiraling rise and similarities in living costs between New York City and its surrounding counties.

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[19] References to testimony before the District Court are cited as Tr. . The appendix references cited above appear in Doc. No. 61 at Tr. 74 and Tr. 108. See also Affidavit of Joseph Barbaro in Support of Plaintiffs' Motion for Summary Judgment, Doc. No. 34.

[20] Affidavit of Irene Blickstein in Support of Plaintiffs' Motion for Summary Judgment, Doc. No. 13.

[21] Affidavit of Dr. Lewis Fraad in Support of Plaintiffs' Motion for Summary Judgment, Doc. No. 13.

[22] Affidavit of Marjorie Miley in Support of Plaintiffs' Motion for Summary Judgment, Doc. No. 3.

Although New York vigorously denied any reduction in its need standard, it maintained that continuation of the administrative standards of need might cost a total of 10 million dollars more in benefits each month (66, Tr. 125; 284, Tr. 157-158). The case was submitted, after argument, to the three-judge District Court on May 2.

Section 131-a was amended on May 9 to authorize the Respondent Administrator, if "it accords with federal requirements," to increase or decrease at any time the statutory allowances for any county outside New York City upon finding that the total costs of the budgeted items in the statutory need standard was more or less than the costs relied on by the Legislature. New York Social Services Law §131-a(4). Although without limit on decreases, no increase could be higher, regardless of costs, than the reduced New York City standard. Thereupon, on May 12, the three-judge court, ruled *per curiam* that although it had been properly convened, the substantial constitutional attack on the legislative schedules was now moot or unripe in light of the Respondent's discretionary power to raise or lower the schedules for the counties outside New York City. It ruled that "there is no reason for continuing the three-judge court" and remanded the federal statutory claim to the initial district judge "for such further proceedings as are appropriate" (135, 136).

Upon remand, the district judge, without further hearing or submissions, on May 15 entered a substantially dispositive 64-page opinion construing in considerable detail the controlling federal statute and setting forth the manner in which New York's reduced standard of need in section 131-a offends the statute (167). Summary judgment motions were continued to allow the parties to establish more pre-

cisely the magnitude of the welfare cutback and the temporary restraining order was transformed into a preliminary injunction to allow New York to pursue an interlocutory appeal (138). The appeal was expedited on May 21, 1969 and heard before a specially designated panel, Chief Judge Lumbard, Judges Hays and Feinberg,[23] on June 4, at which time the Circuit Court denied Respondent's renewed request for a stay, stating that a final decision would be rendered promptly. On June 11, the Court of Appeals *sua sponte* granted a stay, Judge Feinberg dissenting (219), and on June 16, denied Petitioners' motion to vacate the stay or to enter a final order to facilitate an expedited application for review or relief in this Court, Judge Feinberg again dissenting. Concurrently, the Circuit Court also denied Respondent's motion to stay summary judgment proceedings in the District Court and Respondent provided that court with the clarifying information previously requested. On June 18, again without need for further hearing or argument, District Judge Weinstein issued a summary judgment (208) and permanent injunction (214), finding that there was no genuine issue of material fact, since the data submitted by the parties "is consistent so far as it is legally relevant" (208). This data revealed that New York's asserted "change to the flat grant system . . . has been used as a subterfuge to enact drastic cuts in both standards of need and levels of payment to meet the exigen-

[23] Circuit Judge Moore, the presiding judge on the three-judge district court panel, was designated to sit on the Appellate panel along with Chief Judge Lumbard and Judge Feinberg, two of the judges who heard the initial application for a stay and expedition. To avoid further complexities and assure a validly constituted panel, Petitioners reluctantly brought 28 U.S.C. §47 to the attention of the Circuit Judges. Thereupon Chief Judge Lumbard designated Judge Hays to sit.

cies of a state budget . . ." (208, 209). Specifically the court found that "The decreases under section 131-a are greater in all respects . . ." (209). On the state's own figures, which omit consideration of the critical supplements to the grant, "141,313 families will receive decreases; the total monthly amount of these decreases is $3,420,441 and the average monthly decrease is $24.20" (209). Where the eliminated supplements for New York City are included (where 80 percent of AFDC families in the state reside), "the number of families suffering decreases rises to approximately 173,900 and the aggregate dollar amounts of their decreases totals approximately $5,950,000 per month" (210). Conversely, 245 families (those with six or seven children, the oldest of whom is five years of age) receive an increase of a monthly aggregate of $530 (210). Comparable data was not available for upstate. Using a liberal estimate of 30 percent as the State's share in AFDC, Judge Weinstein found that "the decrease [for 1969-1970] in total AFDC payments under the New York State program is no less than $75,000,000" (212).

On June 24, this Court declined to intervene before judgment in the Court of Appeals, and dismissed the three-judge court appeal for want of jurisdiction. *Rosado* v. *Wyman*, —— U.S. ——, 89 S. Ct. 2134 (1969). All appeals were consolidated in the Second Circuit, which on July 16, without further briefing or argument on the summary judgment, issued its opinions, three in all. Chief Judge Lumbard (231) and Judge Hays (216) separately found, for a variety of alternative reasons, that the federal District Court was without jurisdiction or abused its discretion in the exercise of jurisdiction in ruling on whether New York had breached its federally-imposed obligation. Judge Hays ruled that

the District Court on remand was without power to decide the Social Security Act claim, since it "was no longer pendent to any claim at all, much less to any claim over which the single judge could exercise adjudicatory power" (221, 222). Chief Judge Lumbard, while disagreeing on power, found that the single-judge District Court abused its discretion in exercising jurisdiction, since "the extreme nature of the injunctive remedy against the state weighs heavily against the adjudication of a pendent claim by a single district judge," and since "the federal claim seems more apt for initial resolution by the Department of Health, Education and Welfare, than by the courts" (233). Judge Hays subscribed to these factors also. "[N]ot rest[ing] solely on jurisdictional grounds" (227), Judge Hays proceeded to find that the federal statute did not prohibit a reduction of payments in New York (228). Chief Judge Lumbard, without explication of the federal statute, added "that [dissenting] Judge Feinberg's view of the merits does not persuade me" (235). The preliminary and permanent injunctions were vacated, summary judgment reversed, and the three-judge court rulings affirmed as appropriate exercises of discretion. Judge Feinberg in a lengthy dissent would have affirmed the District Court on both jurisdictional grounds and on the merits (235).

Summary of Argument

I.

Petitioners' major premise is that New York must comply with paramount federal law in welfare matters as in all others. The claim before this Court invokes the AFDC Title of the Social Security Act, pursuant to which Congress has made huge sums available to New York on condition that certain federal terms be met. New York accepts and utilizes these monies and continues to participate in the federal program. *King* v. *Smith,* 392 U.S. 309 (1968) and *Solman* v. *Shapiro,* 300 F. Supp. 409, (D.C. Conn.) *aff'd* 38 U.S.L.W. 3125 (Oct. 13, 1969), settle that individual recipients have standing to enforce the plan conditions of Title IV and further that "any state law or regulation inconsistent with such federal terms and conditions is to that extent invalid." *King* v. *Smith,* 392 U.S. at 333, n. 34 (1968). The conflict set forth herein is between Section 131-a, an integral part of New York's plan for participation in AFDC, and the terms of Section 402 (a)(23), a federal plan condition. If that conflict exists, New York "has breached its federally-imposed obligation to furnish 'aid to families with dependent children'" in compliance with the Federal Act. *King* v. *Smith,* 329 U.S. at 330.

II.

The conflict turns on the meaning and application of Section 402(a)(23), an act of Congress, whose terms are neither vague nor uncertain in operation. Viewed against the rudiments and problems of public assistance administration, and following the canon of "construing laws as

saying what they obviously mean," *Roscher* v. *Ward*, 279 U.S. 337, 339 (1929), there is not a fair contest between probabilities of meanings. The statute admits of but one intelligible and rational will of Congress.

The terms of the statute operate upon well-known rudiments of state AFDC plans—standards of need and maximums. By looking to "the amounts used by the State to determine the needs of individuals," and "changes in living costs since such amounts were established," the statute fixes upon a State's need standard in force during a base period, the time of enactment in January 1968. It requires a cost of living adjustment to that entire need standard by July 1, 1969. In states without maximums, the repriced standard is fully reflected in the amount of aid paid to families. The cost of living adjustment is automatically passed on to AFDC families (though their actual purchasing power remains the same as it was when the amounts were last established). For states utilizing maximums during the base period, the statute goes on to mandate that "any maximums . . . will have been proportionately adjusted." The adjustment to the need standard may not be nullified by ceilings on the amount of aid paid. The only variable among the states is the repricing factor, which depends upon the cost of living changes in each state from the time it last established its need standard. The overall effect in all states is thus to require a maintenance of effort in retaining grant levels commensurate with those prevailing in January 1968, with the addition of one cost of living increase geared to the extent of each state's effort in meeting its own need standard in January 1968. The language of the statute is not ambiguous and its operation is certainly not complex.

III.

The legislative background and evolution of 402(a)(23) affirms its unambiguous, albeit modest, purpose. That no state affords AFDC payments at levels that encourage broken families "to maintain and strengthen family life . . . and to attain or retain capability for maximum support and personal independence," the national objectives of AFDC, 42 U.S.C. §601, has been a source of pervasive federal concern since the initial venture of 1935. Federal responses are expressed in a series of expanded federal requirements and vastly increased federal financial participation. Concerns with inadequate payments undermining national purposes culminated in 1967 in the then-Administration's proposal to require all states to pay need in full under annually updated standards. The controlling and long accepted recognition of the inherent and large variations among the several states in wealth and living costs led to the modification of this far-reaching proposal in the Senate Finance Committee, whose bill, after amendment in the Conference Committee, became 402(a)(23). The evolution of §402(a)(23) from the Administration's initial proposal leaves no doubt that Congress, and its specialist committees, fully appreciated the language, import and effect of the statutes as finally enacted. Plain meaning and plain statements of the committees are not undercut by Respondent's invocation of some supposed arcane mysteries of the legislative process, particularly the acquiescence of an assumed opposition in the midst of reaching an overall legislative accord on omnibus legislation. The statute, as enacted, does not represent a fundamental alteration in the federal-state relationship in grant-in-aid programs and indeed is not without recent

precedent in such programs. While a departure in AFDC, the statute reflects the well-established congressional pattern of accepting variations among the several states and assuming greater federal financial responsibility for states with lesser wealth and lower levels of aid.

IV.

New York has transformed its need standard in force in 1968 by the elimination of the differential amounts used to meet the needs of older children for food, clothing, educational and social necessities, and by the elimination of all the amounts administered as critical supplements to the semi-monthly grant, excepting rent. The effects of these transformations are seen not only in the severely reduced AFDC budget, but in their impact on the Petitioners before this Court. New York has not merely consolidated its standard of need, but has reduced the content of the standard. It has cut welfare grants to meet the exigencies of a state budget in violation of an Act of Congress.

V.

The District Judge had power to decide the pendent federal claim, following remand from the three-judge court. Federal power to decide the federal statutory claim did not expire when the constitutional claim was held moot. *United Mine Workers* v. *Gibbs,* 383 U.S. 715 (1966). As jurisdiction over the claim was vested in the District Court by 28 U.S.C. §1343(3) not §2284, the dissolution of the three-judge court left the remaining claim properly before Judge Weinstein.

The District Judge did not abuse his discretion in exercising power over the pendent federal claim. Under *United Mine Workers* v. *Gibbs, supra,* a full trial had been held on the issue, and both Petitioner and Respondent recognized the urgent need for adjudication before July 1. Respondent did not request the District Judge to decline further jurisdiction.

The reasoning of the Circuit Court was that, in view of the relief sought and the "pendency" of H.E.W.'s review of §131-a, jurisdiction must be declined. This is to say the case is "almost" non-justiciable and "almost" unripe. These are not proper bases for declining pendent jurisdiction. The discretionary limitations on the exercise of federal power to decide pendent claims serve to allocate cases between federal and state courts. This case could be refiled in state court, and that court would not be able to avoid the very same issues of justiciability and ripeness under federal law. In view of the investment of resources in federal court, burdening state courts with these far-reaching federal issues is erroneous. The case should be decided now.

Under well-settled principles, the Circuit Court's unarticulated fear that the case was non-justiciable, or almost unripe, were groundless. Relief is available here under *Ex parte Young,* 209 U.S. 123 (1908); the decree does not require state expenditures, and the fact that the state may prefer to spend money, rather than choose other alternatives, raises no question of federal power. Under *King* v. *Smith,* 392 U.S. 309 (1968), it is settled that judicial decision of Social Security Act claims is not to await H.E.W. action. H.E.W. merely negotiates, and recipients have no right whatsoever to require initiation

of an H.E.W. proceeding or to participate in any that H.E.W. might initiate on its own.

VI.

The statutory claim herein is properly maintained pursuant to 42 U.S.C. §1983 because it seeks redress of "rights" "secured" by the "laws" of the United States. Both 28 U.S.C. §1343(4) and 28 U.S.C. §1343(3) confer jurisdiction over any such claim. Section 1983 is a statute "providing for the protection of civil rights," within the meaning of §1343(4). It is, as history makes clear, a statute "providing for equal rights" within the meaning of §1343(3). As §1983 is intended by Congress to create a *federal remedy* against state action illegal under federal law, it would be anomalous to require some such claims to be maintained in state courts.

28 U.S.C. §1331 also creates an independent basis of jurisdiction for this suit. The claim arises under federal law, and the amount in controversy was found by the District Court to be greater than $10,000. The Court of Appeals ruling that damages from impaired health, malnutrition, and lessened educational opportunity are "indirect and speculative" and therefore not to be evaluated is erroneous under this Court's holding in *Oestereich* v. *Selective Service Local Board No. 11,* 392 U.S. 233 (1968). It is also erroneous because the very damage Congress sought to prevent by enactment of 42 U.S.C. §602(a)(23) was precisely those harms resulting from reduction of subsistence grants. Accordingly, such harms are properly to be estimated in adjudicating the amount in controversy. Furthermore, the direct loss of income exceeds $10,000 under this Court's holding in *Aetna Casualty Co.* v. *Flowers,* 330 U.S. 464 (1947).

I.

New York has breached its federally-imposed obligation to furnish aid to families with dependent children in compliance with the terms and conditions of the Federal Act.

Petitioners' major premise is simply stated: New York State must comply with federal law in welfare matters as in all others. The claim before this Court invokes the AFDC Title of the Social Security Act, pursuant to which Congress has made huge sums available to New York State on condition that certain federal terms be met to maintain national program objectives. *King* v. *Smith,* 392 U.S. 309 (1968), and *Solman* v. *Shapiro,* 300 F. Supp. 409 (D.C. Conn. 1969), *aff'd* 38 U.S.L.W. 3125 (Oct. 13, 1969), settle that individual recipients have standing to enforce the plan conditions of Title IV. *King* and *Solman* further settle that "any state law or regulation inconsistent with such federal terms and conditions is to that extent invalid." *King* v. *Smith, supra* at 333, n. 34 (1968); *Solman* v. *Shapiro, supra.* See also *Shapiro* v. *Thompson,* 394 U.S. 618 (1969). The conflict to be shown here is between Section 131-a, New York Social Services Law, an integral part of New York's plan for participation in AFDC, and the terms of 402(a)(23), on which New York's use of federal money is conditioned. If the conflict exists, New York "has breached its federally-imposed obligation to furnish 'aid to families with dependent children'" (*King* v. *Smith, supra* at 330), in compliance with the Federal Act. We turn to that conflict, first setting forth the requirement imposed by the Federal Act and then the manner in which New York's AFDC plan offends that requirement.

The meaning of 402(a)(23), a statute of Congress, cannot be ascertained either by pejoratively terming it a narrow technical provision or "a gesture of uncertain meaning," H.E.W. *Lampton* Brief A-26, or by ascribing to it a plethora of meanings and purposes which reduce congressional action to an unintelligible, if not ludicrous, exercise in futility. The subject matter of this statute, state AFDC need standards and maximums, is not one unfamiliar to the Congress or the specialist committees dealing with Social Security Act legislation for well over three decades. This is not a case of broad delegation of law-making powers over an uncharted area. *Cf. Textile Union Workers of America* v. *Lincoln Mills of Alabama,* 353 U.S. 448 (1957). We submit that this statute, on its face and projected against the rudiments and problems of public assistance administration apparent to the Congress in 1967, see *United States* v. *American Trucking Assn's, Inc.,* 310 U.S. 534, 543 (1940), admits of but one intelligible and rational will of Congress. So viewed, there is not a fair contest between probabilities of meanings. The state and federal expenditures entailed in a maintenance of effort under 402(a)(23) were facts obvious to Congress and its judgment on the necessity of such expenditures is for our purposes final. New York's fiscal concerns were and are well expressed in the national legislative process, in which New York is not an unheard voice. *Cf. United States* v. *Carolene Products,* 304 U.S. 144, 152, n. 4 (1938); Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 *Colum. L. Rev.* 543 (1954). That process has reached a conclusion and a command in 402(a)(23) which is binding on New York. To intelligently expound that command we set out in some detail the background and

evolution of 402(a)(23) in the context of the Aid to Dependent Children program.

A. *The Language of 402(a)(23) Is Without Ambiguity and Clearly Reveals What Is Required of the States.*

We begin with the words of the statute to ascertain its meaning, since "there is no canon against using common sense in construing laws as saying what they obviously mean." *Roscher* v. *Ward*, 279 U.S. 337, 339 (1929). Unlike many of the AFDC statutory conditions necessitating supplementary elaboration, *e.g.*, §402(a)(4), 42 U.S.C. §602(a)(4) ("fair hearing"), the command of 402(a)(23), directed at public welfare officials, is neither open-ended nor broad. See *Addison* v. *Holly Hill Fruit Co.*, 322 U.S. 607, 616 (1944). Indeed, the original interpretive H.E.W. regulation to the states merely restated the statute practically verbatim, 33 Fed. Reg. 10230 (1968),[24] and the recently expanded regulation of January 23, 1969, is itself not elaborate. 45 C.F.R. §233.20(a)(2)(ii), 34 Fed. Reg. 1394 (1969). The statute provides:

> "A State plan . . . must
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> (23) provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of

[24] The original regulation provided:

> "A State plan . . . must . . . provide that by July 1, 1969, a State standard of assistance for the AFDC program will have been adjusted to reflect fully changes in living costs since such standards were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted."

aid paid to families will have been proportionately adjusted."

The terms used are familiar indeed in public assistance administration in all states. "The amounts used by the State to determine the needs of individuals" is a comprehensive description of a state's standard of need (also called standard of assistance), which has long been central in public assistance plans "to identify needy individuals and to establish the amount of assistance." 42 U.S.C. §602 (a)(1), H.E.W. Handbook of Public Assistance, Pt. IV, §3120. Pursuant to long-standing federal requirements, each state assigns monetary amounts to the component items it deems essential for decent family life (*i.e.*, food, clothing). 45 C.F.R. §233.20(a)(2)(i), 34 Fed. Reg. 1394 (1969). These amounts theoretically enable families to purchase the required quantity of these essentials.[25] Federal law has not specified any of the items or the costs to be assigned, H.E.W. *Lampton* Brief A-16; hence the states have been free to determine their own standard of need. *King* v. *Smith*, 392 U.S. 309, 318 (1968). The compendium of all these amounts is the need standard by which the recognized requirements of an AFDC family at any given time are determined. The level of benefits in all states is based upon the standard of need. 45 C.F.R. §233.20(a)(2)(i), 34 Fed. Reg. 1394 (1969). In about 29 states, including New York, this standard (or the budgetary deficit, after deduction of income) is paid in full and hence is the *sole* determinant of the amount of aid paid to families with

[25] "[F]acts must be established as to the money amounts necessary to secure the State's defined standard." H.E.W. Handbook, Pt. IV, §3120.

dependent children. Other states, now 31 in all,[26] once determining family requirements through the standard of need, establish a ceiling on the amount of aid to be paid, which the grant may not exceed. The standard of need remains the determinant of payment, but here in combination with a maximum, which may be expressed in dollar limits per child varying with family size[27] or in an ultimate dollar ceiling per family regardless of size.[28] It may also be derived through application of a specified percentage factor to the standard of need (or budgetary deficit), which upon application produces a dollar ceiling on the amount of aid to be paid.[29] Serving the identical purpose of limit-

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[26] National Center for Social Statistics, Social and Rehabilitation Service, Department of Health, Education and Welfare, Report D-3 (October, 1968), Tables 2, 3. Hereafter cited as NCSS Report D-3. Two other states, Oregon and Idaho, formerly paid less than full need. House Comm. on Ways and Means, Section by Section Analysis of H.R. 5710, 90th Cong., 1st Sess., p. 36.

[27] For example, $80 for a parent and one child, $110 for a parent and two children, and so on.

[28] For example, $175 for a parent and five *or more* children.

[29] For example, if the need standard is $60 a month and the State pays 50% of the need standard, an individual without other income would receive aid in the amount of $30. For individuals receiving aid to supplement income, not often the case in AFDC, states may apply the percentage to the need standard, and then subtract income, paying the deficit. Hence in the above example, if there is $30 monthly income, the amount of aid to be paid is zero. States may also deduct income from the need standard and then apply the percentage factor to the remainder, or, as it is called, the budgetary deficit. The above individual with $30 income, deducted from the need standard of $60, reduced by the 50% factor, would receive $15 in aid. The application of the percentage factor to the budgetary deficit thus allows for more supplementation than the application of the percentage factor to the need standard, the first method described above. States use both methods.

ing welfare expenditures by creating a disparity between the standard of need and the amount of payment, these mechanisms are often used in combination, as in Mississippi which pays 27 percent of its need standard, but no more than 25 dollars for the first child ($15 for the second) or 90 dollars for an AFDC family regardless of size.[30] Although without mention in the federal statute or regulations thereunder until after the enactment of 402(a)(23), these state-imposed ceilings have been in use since at least 1938.[31]

The operation of 402(a)(23) in those states that meet need in full is unmistakable. By looking to the amounts *used* to determine need, and changes in living costs since they were last established, the statute perforce fixes upon the standard of need in effect during a base period, the time of enactment of the statute in January, 1968. "The *amounts* used by the State to determine the *needs* of individuals" equally leaves no doubt that the adjustment must be to a state's entire standard of need in force during that period. Plainly, a state may not pick and choose among the items to be repriced or later omit essentials included within the base-period standard. Nor need it, of course, include additional items.

[30] Of the eleven states utilizing ratable reductions to reduce the level of payment to recipients, six (Virginia, West Virginia, Alabama, Kentucky, Mississippi and New Mexico) also impose family dollar maximums on assistance. Two of these states (Alabama and Mississippi) use individual dollar maximums as well. Colorado combines individual dollar maximums with a ratable reduction. NCSS Report D-3, Tables 2, 3.

[31] Bureau of Social Science Research, Inc. The Legislative History of Aid to Dependent Children: A Chronological Account and Analysis of the Federal Legislative Process (1969), at 95.

The effect of the adjustment is also obvious. Since by definition the standard of need is *the* determinant (deductible income aside) of the level of aid in states meeting need in full, the repriced standard of need is, without more, fully reflected in the amount of aid paid to families with dependent children. The cost of living increase is passed on to AFDC families (though their actual purchasing power remains the same as it was when the amounts were last established).

The operation of the statute in those states where a maximum in conjunction with the need standard determines the level of aid is also clear. In recognition of those 33 states then paying less than full need, the statute goes on to mandate that "any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted." Here the statute focuses upon the need standard and any maximums in force during the base period and does not allow the adjustment to the need standard to be nullified by the ceiling. Where the ceiling is expressed in dollar amounts, per person or family, application of the cost of living factor to the need standard and the dollar limit results in an increase in the amount of aid paid. The amount of that increase is proportionate to the previous relationship between the standard of need and the maximum.[32] Similarly, where the limit is derived from a percentage factor, the adjustment of the need standard results in an increase in the amount of aid to be paid,[33] also pro-

[32] *E.g.*, where a need standard for a family of two is $100, the maximum $80 and the cost of living factor 10%, the adjusted need standard is $110 and the adjusted maximum is $88.

[33] *E.g.*, where need is $100, the State pays 80% of need, and the repricing factor is 10%, the adjusted need standard is $110 and the adjusted amount of aid is $88, as in the above example.

portionate to the previous relationship between need and the maximum payment.[34] Hence, the cost of living increase is passed on to AFDC families in these states, too, diminished only by the extent to which these states paid less than full need in the base period.

The only variable among the states is the repricing factor, which depends upon the cost of living changes in each state from the time it last established its need standard. The overall effect in all states is thus to require a maintenance of effort in retaining grant levels commensurate with those prevailing in January, 1968, with the addition of one cost of living increase geared to the extent of each state's effort in meeting need in January, 1968. The language of the statute is not ambiguous and its operation is certainly not complex.

B. *The Background of 402(a)(23) Reveals the Central Problem Behind Its Requirements.*

It has long been recognized that no state affords assistance payments allowing for healthy and decent family life, no less allowances that encourage broken families "to maintain and strengthen family life . . . and to attain or retain capability for maximum support and personal independence," which are the national objectives of AFDC. 42 U.S.C.

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[34] Where the percentage factor is applied to the adjusted standard of need, and there is income to be deducted, minor adjustments are necessitated by the distorting effect of deducting income, which is a constant. This adjustment is required for the relatively few AFDC families who receive aid in supplementation of earned income. It is not required where the percentage factor is applied to the budgetary deficit, after deduction of income from the recognized amount of need. See note 29, *supra*.

§601.[35] It is also well known that inadequate amounts of aid result from the imposition of maximums, the exclusion of essential items in the standard of need, the initial assignment of unrealistically low prices to the items included, and the failure to keep pace with living costs. H.E.W. *Lampton* Brief A-17. Prior to 1968, thirty-three states paid less than their own standard of need, and no state's standard of need contained any amenities or all common necessities.[36]

New York is illustrative, affording as it did prior to the cutback one of the highest *average* per person or family AFDC allowances in the nation. Let us first recognize that the highest meant approximately $70 per week to cover all living expenses of a family of four (91, 106). Many basic items were excluded from its standard of need, *e.g.*, newspapers, books, a radio, gifts for children, and so on. Such supposed luxuries could only be purchased at the sacrifice of some other necessity and the only flexibility is found in the 85 cents (now 65 cents) daily allowance for food. New York's standard also included unrealistically low cost estimates for many of the budgeted items, including food, clothing, and furniture.[37] The substantial and

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[35] "Most States do not make adequate assistance payments." H.E.W. *Lampton* Brief A-17.

[36] House Committee on Ways and Means, Section by Section Analysis of H.R. 5710, 90th Cong., 1st Sess. (1967), p. 36. Hereafter cited as Analysis of H.R. 5710.

[37] For example, the budgeted allowance for the cost of food is computed on the basis of the U. S. Dept. of Agriculture's "Low-Cost" Food Plan, though the inadequacies of that food plan are widely acknowledged. It projects that poor people will buy 51% less meat (emphasizing grains and cereals instead) than studies that reveal that they actually do purchase. See, *e.g.*, Haber, *Poverty Budgets: How Much is Enough*, Poverty and Human Resources Abstracts, Vol. 1, No. 2, p. 107 (1966); Orshansky, *Counting the Poor: Another Look at the Poverty Profile*, Social Security Bul-

uncontroverted evidence in this case well makes the point. Mitchell I. Ginsburg, Commissioner of Human Resources, former welfare commissioner, stated "I know of no study [of low income budgets] . . . which does not set a level substantially higher than the existing welfare grants" (39, Tr. 76). See also 40, Tr. 78; 43, Tr. 84; 43-44, Tr. 85; 44-45, Tr. 87. Jack Goldberg, New York City Welfare Administrator averred: "It has been my own professional view, and studies done by others [show] that we have not met the standard minimum that people need in this city to maintain themselves" (55, Tr. 106). Joseph H. Louchheim, the Respondent's Deputy Commissioner, acknowledged that AFDC families "of necessity have learned to squeeze every penny" (277, Tr. 143). Joseph Barbaro, Commissioner of Social Services for Nassau County, added that "the present standards of assistance provide for life on a level of subsistence, nothing more, and often less." Affidavit, Doc. No. 34. The characteristics of impoverishment—high infant mortality, malnutrition, stunted education performance—were and remain commonplace among AFDC families in New York.[38]

Thus, even in a leadership state in AFDC, the inadequacies in the grants paid were gross and the human con-

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letin, Vol. 31, no. 3, at p. 5 (Jan., 1965). The actual food grants in New York fell significantly short of even the "Low-Cost" plan since inflated reliance was placed upon the prices which the component items cost in such places as city markets and upstate stores, where city welfare recipients obviously do not shop. The cost estimates for major items of clothing and furniture were made on the assumption that all these items would be purchased at the Salvation Army or Goodwill, an assumption which ignores the obvious fact that these private social agencies could not possibly supply all of the clothing and furniture needed by the 850,000 AFDC recipients in New York State.

[38] See note 21 *supra*.

sequences disastrous. Members of Congress, like most men, were not unaware of these facts.

C. *Federal Concern With AFDC Payments in All States Does Not Begin With 402(a)(23).*

Section 402(a)(23) is not an unusual departure from well-established federal concerns. Congressional consideration and responses to the level of benefits in a program whose central task is to provide a guarantee against the consequences of economic deprivation dates back to the initial venture in 1935, when both federal financing and the understanding of federal powers were substantially more constricted. *Cf. Shapiro* v. *Thompson,* 394 U.S. 618, 640 (1969). In the very first bill we find serious discussion of a requirement that the states afford "reasonable subsistence," [39] which was not adopted in recognition of the inherent and large variations among the several states in wealth, living costs and social and economic conditions. Recognition of these differences continues throughout the years to control federal responses to the problem of grant levels in the several states. A more certain view of federal powers and experience under the Act led to an expanded network of federal controls, including a series of prohibitions on exclusionary mechanisms used by states during periods of fiscal difficulty.[40]

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[39] House Comm. on Ways and Means, Economic Security Act Hearings on H.R. 4120, 74th Cong., 1st Sess. (1935).

[40] In 1950, for example, in order to limit certain practices previously used by the States to conserve resources (such as refusing to accept or approve new AFDC applications or the use of substitute father statutes and regulations) Congress required that "Aid . . . be furnished with reasonable promptness to all eligible individuals" and "that all individuals wishing to make application . . . shall have an opportunity to do so." 42 U.S.C. §602(a)(10). See H. Rep. No. 1300, 81st Cong., 1st Sess., pp. 48-148 (1949).

Inadequate grants resulting from both deficient standards of need and the use of maximums were repeatedly documented to the Congress during the early years and periodically thereafter. Citing the above differences among the states as inconsistent with a federal standard, Congress time and again increased the federal matching formula (from a national overall average of 13% in 1936 to 43% in 1947 to 55% in 1964),[41] with special emphasis upon considerably more federal responsibility for those states with lesser wealth and lower payments.[42] In 1958 Congress authorized an averaging formula to accommodate greater individualization in spartan AFDC need standards.[43] Although the focus in 1962 was on vocational training and family services to reduce dependency, the Congress was then again urged to require "reasonable standards" of assistance. It responded by making mandatory a separate grant for the parent or caretaker of dependent children to insure the economic security of the entire family, 42 U.S.C. §606(b)(2) and by authorizing an H.E.W. Advisory Council on Public Welfare to undertake a comprehensive review of public assistance payments and the federal-state relationship. 42 U.S.C. §1314. In 1965, Congress again increased the AFDC matching formula, 42

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[41] Welfare In Review, Department of Health, Education and Welfare, Statistical Supplement, 1966 ed., Table 13, p. 17.

[42] The federal percentage for each state is based on per capita income and the federal government bears the major part of the first $18 per child outlay in AFDC and $37 in Aid to the Aged. 42 U.S.C. §§603(a), 303(a). This has been true throughout the years. See also Welfare in Review Department of Health, Education and Welfare, Statistical Supplement, 1966 ed., Table 15, p. 19, setting forth percentages of federal matching. These ranged in 1965 from a low of 41.0% in Minnesota to 82.4% in Florida.

[43] 42 U.S.C. §603(a).

U.S.C. §603(a), and through allowing use of the Medicaid formula, substantially increased federal matching for the wealthier states by removing the federal ceiling on participation, insuring no less than 50 to 65 percent regardless of the amount of aid paid in AFDC and the adult programs. 42 U.S.C. §1318; H.E.W. Handbook, Pt. V., §2233.[44] It also required through the matching formula the states to maintain and improve on their respective efforts in 1965. 42 U.S.C. §1317. Concern over the failure of states to maintain and increase efforts under these inducements culminated in the prominent H.E.W. Advisory Council Report "Having the Power, We Have the Duty," which found that "public assistance payments are so low and so uneven that the Government is . . . a major source of the poverty on which it has declared unconditional war."[45] State standards of need and levels of aid, with their relationship to the well being of dependent children, were not new to the Congress or its committees in 1967.

D. *The Legislative Evolution of 402(a)(23) Leaves No Doubt on the Intended Meaning and Effect of 402(a)(23).*

Section 402(a)(23) begins with the Advisory Council Report recommending to the then Administration that

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[44] For example, the higher benefit states received increases from approximately 40% federal share to 50% or higher. Federal contributions to New York rose from 42% to 50%. Welfare In Review, Department of Health, Education and Welfare, Statistical Supplement, 1966 ed., Table 15, p. 19.

[45] "Having The Power, We have the Duty," Summary of Recommendations to the Secretary of Health, Education and Welfare by the Advisory Council on Public Welfare, p. 2 (June 29, 1966).

"A floor of required individual and family income . . . be established for each state . . . to constitute the minimal level of assistance which must prevail in that state." [46]

The Administration in 1967 submitted its comprehensive reforms of the Social Security Act to the House Committee on Ways and Means, H.R. 5710, which included, *inter alia,* proposals . . . "designed to increase the adequacy of public assistance payment," [47] by requiring the states in the four categorical assistance programs to meet in full their own standard of need in force during a base period and to reprice such standards by July 1, 1969, and annually thereafter.[48] Focusing on "adequate support for needy children," the Administration observed that "although a few States define need at or above the poverty

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[46] "Having The Power, We have the Duty," Summary of Recommendations to the Secretary of Health, Education and Welfare by the Advisory Council on Public Welfare, pp. 2-3 (June 29, 1966).

[47] Analysis of H.R. 5710, p. 1.

[48] The Administration proposed that the States be required to provide:

". . . effective July 1, 1969, for meeting . . . all the need, as determined in accordance with the standards applicable under the plan for determining need, of individuals eligible to receive aid to families with dependent children (and such standards shall be no lower than the standards for determining need in effect on January 1, 1967) and . . . effective July 1, 1968, for an annual review of such standards and (to the extent prescribed by the Secretary) for up-dating such standards to take into account changes in living costs."

House Committee on Ways and Means, Hearings on H.R. 5710, 90th Cong., 1st Sess. (1967), p. 59.

level, no State pays as much as that amount," and that though "about half the States updated their minimum standards this year [1967], most States have not been doing so annually."[49] No additional federal sharing was suggested, save for a discretionary 60 million dollars for the initial two fiscal years to relieve hardship in certain states resulting from *all* of the additional public assistance requirements of H.R. 5710, including those in the adult programs.[50] The matter was explored before the House Committee, but the bill reported out as H.R. 12080[51] sub-

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[49] Analysis of H.R. 5710, p. 36.

[50] "The Secretary would be authorized to make grants totalling not more than $60 million each year . . . to assist States in meeting the costs of other requirements imposed by these amendments. In making such payments, the Secretary would, among other factors, consider the fiscal ability of the State, its fiscal effort for welfare and related programs, the effect of increases in social security benefits, and the amount of State and local funds required in order to comply with the new provisions." Analysis of H.R. 5710, p. 9. These requirements included the Administration's substantial income exemption for AFDC recipients and the requirement affecting 33 states of paying need in full.

[51] For AFDC, the bill included a substantial mandatory income exemption (Section 202(b)), a mandatory work and training program for AFDC mothers (Section 204), and a federal limitation for purposes of federal matching, on the number of children whose eligibility is based upon a parent's absence from the home, the so-called AFDC freeze (Section 208). Senate Committee on Finance, Social Security Amendments of 1967, Hearings on H.R. 12080, 90th Cong., 1st Sess. (1967) pp. 117-128, 142.

The freeze placed a federal ceiling on the number of dependent children in the absent parent subcategory for whom federal AFDC contributions would be made; the ceiling was to be determined by the ratio of such children receiving AFDC to the number of children residing in the State during a base period. Expressing concern over the rising numbers of abandoned children, the latter proposal was deemed necessary to coerce the states to make ade-

stantially differed from the Administration's submissions, save for the substantial increase in Social Security benefits for 23 million persons.[52] Under the traditional rule of no floor amendments and limited debate, H.R. 12080 passed the House with near unanimity on the strength of the increase in Social Security benefits.[53]

The Administration, through H.E.W. Secretary Gardner and Under Secretary Cohen, redoubled its efforts before the Senate Finance Committee, particularly in regard to the AFDC proposal for annual updating and meeting need in full, which was afforded first place in H.E.W.'s submission of public assistance amendments.[54] The Administration and seven senators urged that full payment of an annually updated AFDC standard of need was essential

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quate use of the remedial, training, and family services programs of the 1962 amendments, as well as the Work Incentive Program.

On the floor of the House, Rep. Mills, Chairman of the House Ways and Means Committee explained:

> "We tried 1962 to get the States to provide this training and to put it into effect. They refused to do it. If we do not put some degree of coercion upon the States, in my opinion they are going to be perfectly willing to do as they have done in the past, to hand out a welfare check and not do anything more for these poor people who need everything man can do to improve their condition to be done for them.
>
> "Yes, this freeze provision is for the purpose of putting pressure on the States, to make the rest of the program work, and only for that purpose." 113 Cong. Rec. 36367 (1967).

The debates in Congress were thereafter to center on these controversial provisions and the extent of the Social Security increase.

[52] Analysis of H.R. 5710, p. 49.

[53] 113 Cong. Rec. 23132 (1967).

[54] Senate Committee on Finance, Social Security Amendments of 1967, Hearings on H.R. 12080, 90th Cong., 1st Sess. (1967), p. 716.

to reduce dependency.[55] Support before the committee was broad-based, with a large number of public officials and leaders of private organizations stressing the necessity for an increase in AFDC payments.[56] Opposition was primarily directed to the payment of full need requirement, particularly on the ground that there was no substantial appropriation to cushion the impact in those states then using maximums, where, because of their lower per capita income, federal fiscal responsibility traditionally has been far greater.[57]

The Senate Committee dropped this proposal but adopted the balance of the administration bill requiring

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[55] Secretary Gardner described the inadequate levels of payments in the States resulting both from the failure to update the need standard and the imposition of maximums. *Id.*, at 216-17. Undersecretary Cohen testified in depth that the failure in 1962 Service-Programs and the rising AFDC roles were owing to the dependency and deprivation suffered under current levels of payment. *Id.*, at 258-9.

Those Senators speaking in favor of the proposals to increase grants included Brooke (R. Mass.), Javits (R. N.Y.), Kennedy (D. N.Y.), Kennedy (D. Mass.), Morse (D. Ore.), Tydings (D. Md.), Burton (D. Calif.). *Id.*, at pp. 826-31, 903-06, 1397-1406.

[56] For example, Mayor Lindsay of New York City stated that AFDC payments ". . . are too low to sustain even a minimal, decent standard of living" and urged the adoption of the Administration proposal. *Id.*, at 1131-32, 1144-45. George Meany spoke even more strongly in support of the Administration proposal, including the full need requirement which would itself ". . . permit only a slight improvement in the abysmally low level of welfare payments." *Id.*, at 1419-20 and 1446ff.

[57] House Committee on Ways and Means Hearings on H.R. 5710, 90th Cong., 1st Sess. (1967), pp. 1581, 1713, 1761-63, 1784-85, 1787, 1792-94, 1869-70, 1944-45. *Cf. Id.*, at 1581, 1713. Senate Finance Committee Hearings on H.R. 12080, 90th Cong., 1st Sess. (1967), pp. 1293, 1298, 1303-04; *Cf. Id.* at 941, 1942.

in AFDC a cost of living adjustment by July 1, 1969, and annually thereafter. Deleting the payment of full need requirement, the Senate Committee now modified the language to require that "any maximums . . . on the amount of aid" be proportionately adjusted. The provision read:

> "Paragraph (5) of Section 213(a) . . . requires a State plan for the dependent children program to provide that by July 1, 1969, and at least annually thereafter, the amounts used by the State to determine the needs of individuals will be adjusted to reflect fully changes in living costs since such amounts were established, and that any maximums that the State imposes on the amount of aid paid to families will be proportionately adjusted." S. Rep. No. 744, 90th Cong., 1st Sess., p. 293 (1967).

Its plain requirements were summarized in the Senate Committee Report:

> "States would be required to price their standards used for determining the amount of assistance under the AFDC program by July 1, 1969, and to reprice them at least annually thereafter, adjusting the standards and any maximums imposed on payments to reflect changes in living costs." *Id.*, at 170.

Although the Committee observed that its AFDC provisions "would require the States to take on new and expensive tasks," the expansive federal matching formula and continued state efforts were relied on to finance these changes. *Id.* at 166.

The Committee also reported out a companion provision which required a mandatory $7.50 monthly increase

(reflecting the amount of the cost of living adjustment in Social Security benefits) for recipients in the Adult programs, half of whom receive such benefits. This change, too, was to be accomplished through the adjustment of standards used for determining need and any maximums on the amount of assistance in force during a base period.[58] Restoring many of the Administration's proposals and adding 295 amendments to H.R. 12080, the Senate Committee rejected the controversial AFDC limitation on federal matching for the absent parent sub-category of cases and reported out the bill on a straight party line vote.[59]

Numerous amendments were added on the floor of the Senate. Debate on AFDC centered on the work and training program (WIN), whose requirements, in an amendment sponsored by Senator Robert Kennedy, were made voluntary rather than mandatory. The AFDC program for families with unemployed fathers, on the other hand, was made mandatory in all states, without additional appropriation. To maintain parity between the Adult programs and AFDC,[60] Senator McGovern proposed, as an addition to the AFDC cost of living provision, a mandatory 11 percent ($4.00 per person) increase[61] for AFDC recipients in all states, effective July 1968, also to be accomplished by adjustment of need standards and maximums.[62]

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[58] S. Rep. No. 744, Senate Committee on Finance, 90th Cong., 1st Sess. (1967), p. 170.

[59] 113 Cong. Rec. 32450 (1967).

[60] 113 Cong. Rec. 33541 (1967).

[61] The percentage is based on the national average payment per child of $37.25 per month. 113 Cong. Rec. 33559 (1967).

[62] *Ibid.*

Senator Robert Kennedy urged that this provision was necessary to equalize in 1968 the $7.50 increase in the adult programs; Senator Long pointed out that this amendment would cost 79 million dollars in federal funds and 135 million in state expenditures in 1968.[63] It was defeated by a voice vote, but condition 24 (now 402(a)(23)) was left intact.[64] The Senate Finance Committee bill as amended was passed in the Senate by a 78-6 vote.[65]

The Senate-House Conference Committee restored many of the provisions in H.R. 12080, rendered the $7.50 increase in the Adult programs optional with the states and adopted the Senate AFDC cost of living proposal verbatim, omitting only the requirement for annual repricing after July 1, 1969. Under the heading of "Increasing Income Of Recipients Of Assistance," the Conference Report read the Senate provision to require that "each state (under its plan for AFDC approved under Title IV) must adjust its standard so as to reflect current living costs and make proportionate adjustments in any maximums on the amount of aid." [66] The Conference Committee restored both the AFDC freeze and the mandatory work program for mothers of AFDC children, while rendering the AFDC program for unemployed fathers optional with the states.[67]

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[63] 113 Cong. Rec. 33560 (1967).

[64] *Ibid.*

[65] *Id.* at 33637.

[66] Conf. Rep. No. 1030, 90th Cong., 1st Sess. (1967), pp. 62-63; 1967 U.S. Code Cong. & Admin. News, pp. 3179, 3209.

[67] Conf. Rep. No. 1030, 90th Cong., 1st Sess. (1967), pp. 58, 60; 1967 U.S. Code Cong. & Admin. News, pp. 3203, 3204.

The overall bill was passed by the House under the limited debate and no amendment rules[68] and was rushed through the Senate on a voice vote to avoid a pre-Christmas filibuster over the many concessions to the House, particularly the AFDC freeze and the compulsory work program.[69] Debate in the Senate centered on the misuse of Senate rules in cutting off discussions and on the AFDC coercive provisions, particularly the freeze.[70] Although the result was predestined by the increase in Social Security benefits, some Senators, including some proponents of 402(a)(23), voted against the overall bill as a matter of principle.[71]

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[68] Representative Burton of California reluctantly decided to vote in favor of the bill, stating for the record:

> ". . . that at no time has any Member of this House, except those who served in the Ways and Means Committee, had any opportunity to amend and improve this legislation." 113 Cong. Rec. 36379 (1967).

Representative Burton noted that the bill was being considered under a closed rule which prevented amendments. He lamented that there was no opportunity to strike the freeze or the coercive work program. 113 Cong. Rec. 36386 (1967).

[69] The Conference Report was laid on the table and adopted without discussion, within 30 seconds of the commencement of the Senate session. *Id.*, at 36679. Senator Mansfield, the Majority Leader, objected to these abrupt procedures, noting that although the bill was a very good one in many respects it has abhorent features. *Id.*, at 36680. Senator Long, the floor manager for the bill, indicated his awareness of the possibility of filibuster and the need to adopt the Social Security increases provided in the conference report. *Id.*, at 36680.

[70] Senator Tydings, for example, spoke out against the mandatory work features of the bill and the freeze. He characterized the freeze as placing an unjustified burden on the cities and the states. *Id.*, at 36765. Senator Young of Ohio noted that the House conferees perpetrated an act of "vandalism" on the most needed and advanced expansion of the Social Security Law by either branch of Congress since 1949. *Id.*, at 36775.

[71] Senators Brooke, Kennedy from New York and Kennedy from Massachusetts, Harris, Williams, Hartke and McGovern all in-

There can be no doubt that these committees and the Congress fully appreciated the language, import and effect of 402(a)(23) as finally enacted. In the first place, the statute is a self-evident, albeit limited, departure from the tradition of no federally required adjustments to state need standards and maximums, which was apparent to the committees and to the entire Congress. Secondly, the language of the basic repricing requirement remained practically identical throughout the evolution in the committees versed in public assistance administration and there is no hint in either committee of an intention to change the stated purpose of "Increasing Income Of Recipients Of Assistance." Indeed, the House-Senate Conference Committee amended the provision and reaffirmed its purpose. Third, in having before it the companion proposal requiring an increase in the adult programs through adjustment of need standards and maximums, Congress well appreciated the significance and effect of an adjustment to these mechanisms. Moreover, adopting the requirement of a cost of living increase while declining to accept the companion payment-of-full-need proposal, the purposes and effects of

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dicated their intention to vote against the bill in spite of its liberal Social Security increases. *Id.*, at 36781-82, 36915, 36921, 36924. These Senators made it clear, however, that they were agreeable to other Senators voting for the adoption of the conference report. *Id.*, at 36918. Senator Muskie and Senator Hartke expressed their intention to vote for the bill largely because of the increases in Social Security benefits provided therein. *Id.*, at 36914, 36918. Senator Muskie noted:

> "Even if we corrected the pending legislation in line with the Senate version, we would still have a long way to go. Our principal objective must be to use this legislation and its deficiencies as a base from which we can move to reform our society and correct the inequities which stand between millions of our fellow citizens and the promise of our Constitution." *Id.*, at 36914.

both having been explored in committee, Congress made a choice of goals in a well-defined compromise for reasons that are obvious.[72] Fifth, in using the comprehensive terms "the amounts used by the State to determine the needs of individuals" and then going on to require an adjustment of "any maximums," Congress left little room for evasion or nullification. Finally, in making the pricing adjustment a plan condition for continued participation in AFDC, and allowing ample time for state legislative change and appropriation,[73] Congress unequivocally expressed its intention to compel the states to maintain current efforts in light of inflation.

But Respondent would ignore plain meaning and the plain statement of the committees that well understood the provision by delving deeply into some supposed arcane mysteries of the legislative process. As guides to construction, the arguments range from the specious to the fanciful. To begin with the fanciful, much is made of the placement of 402(a)(23) in the Senate Committee Report, and the greater emphasis afforded the proposed mandatory adult increase. Stress upon the more expensive and immediate

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[72] See *infra* at 59.

[73] Referring to the Senate's mandatory extension of Aid to Children with Unemployed Fathers (AFDC-U), "by July 1, 1969," Senator Harris explained:

> "The only reason why the delayed effective date is necessary is to give States an opportunity to change their State plans without taking away from them in the meantime the federal matching funds for aid to families with dependent children, particularly States in which the legislature does not meet every year. They, especially, will need the additional time in order to change their State plans so as to be in compliance with the amendment." 113 Cong. Rec. 33193 (1967).

See also, H.E.W. *Lampton* Brief A-11.

Adult provision, which was closely related to the accepted Social Security increases, may be good politics, but it signifies little more. New York and others place heavy reliance on the omission of cost estimates for 402(a)(23) as finally enacted, the implication being that therefore no cost impact could have been expected. This interesting result cannot square with any conceivable application of the statute in many states, particularly those twenty or so that have long met their own need standard. If the provision were to have no cost effect, why did the House conferees amend it to require one rather than annual cost of living adjustments? Why did the Senate Committee group it with the $7.50 monthly increase for adult recipients under the heading "Increasing Income Of Recipients of Public Assistance"? S. Rep. 744, at 293. Was that mandatory increase to be had through adjustment of need standards and maximums also illusory, so that making it optional with the states in conference was yet another meaningless gesture? The answer is far simpler. Congress indeed knew the costs entailed in the original Administration proposal for meeting need in full under updated standards; the expected federal share for AFDC in fiscal 1970 was 95 million for paying full need and then 90 million for updating,[14] which are rather modest expenditures in the context of national AFDC legislation. Omission of the full need requirement left accurate estimates of cost exceedingly difficult, since the calculation entails an analysis of the variable effects of maximums in thirty-three states. But the federal costs, from 50 to 80 percent of the total, had to be far less than the original estimate of 90 million for updating need stand-

[14] Senate Committee on Finance, Hearings on H.R. 12080, 90th Cong., 1st Sess. (1967), pp. 721-22.

ards that were to be paid in full. The corresponding costs in the several states were modest, in light of the acceptance of their maximums then in force. These costs are not appropriately measured by the amounts involved in a substantial welfare cutback. The omission of cost estimates from the report of legislative aides to the Conference Committee is thus without significance.[75] For reasons of complexity in calculation, and perhaps political considerations, there also were no cost estimates on the impact of the AFDC freeze in the several states.[76] But it was no less law for that omission.

New York also complains that there was no additional federal appropriation, beyond the 50 to 85 percent matching share, to defray the cost to the states. But realistically viewed, there was no such appropriation for the far broader

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[75] The absence of cost estimates for §402(a)(23) probably also accounts for its omission in the discussion of the numerous amendments to the Social Security Act in the "Summary of Social Security Amendments of 1967," Joint Publication, Committee on Finance of the U.S. Senate and Committee on Ways and Means of the U.S. House of Representatives, 90th Cong., 1st Sess. (1967). The summary is a report "[p]repared by the staff of the Senate Committee on Finance and the House Committee on Ways and Means for the use of the two Committees." Section 402(a)(23) was obviously considered by the Joint Senate-House Conference Committee as well as by the Senate Finance Committee and House Committee on Ways and Means. The Conference Committee amended 402(a)(23) and approved it as amended. See Conf. Rep. No. 1030, 90th Cong., 1st Sess. (1967). The Congress then passed the provision and the President signed it into law. Under such circumstances, it seems incredible to give the omission of discussion in a staff report the effect of repealing or modifying a provision of the United States Code.

[76] 113 Cong. Rec. 36377 (1967). The proponents of the freeze argued, perhaps unconvincingly, that it would have little, if any, impact. *Id.*, at 36368, 36911-12. But see, *Id.*, at 36765, 36775-76, 36815.

Administration proposal or for the proposed mandatory increase in the Adult programs, save for a very modest discretionary fund to assist states in special circumstances (*e.g.*, a change from a low maximum to paying need in full). Additional federally imposed requirements in 1967, and before, rarely do more than rely on the federal monies afforded under the matching formulas, which are no mean part of total expenditures in AFDC. And whatever the political configuration within the Congress of 1967 over specific provisions, all agreed that the states had not discharged their responsibilities in reducing dependency under a series of federal financial inducements and that further inducements were not appropriate. Federal requirements, not federal monies, were the order of the day in 1967; 402(a)(23) was one of these requirements.

New York then points to the rejection of the flat $4.00 per child increase for 1968, as indicating the expectations for 402(a)(23). But this ignores the far different impact of a flat per-person increase in the several states and also the cost adduced for this provision, greater indeed than that attached to the Administration's original proposal for full need and updating. It also fails to recognize that this provision was an addition to, not a substitution for 402 (a)(23), with a rather distinct purpose of paralleling the 11 percent increase in the Adult programs.

There is finally the argument that those who should have, it is assumed, opposed 402(a)(23) did not make much of it on the floor of Congress. Even assuming for the moment that 402(a)(23) should have been a source of controversy, this argument is to wrench the provision out of its total legislative setting in 1967. The Social Security Act Amend-

ments of 1967 were omnibus legislation, entailing some initial 200 proposals, covering five Titles of the Social Security Act,[77] several hundred House and Senate Committee amendments[78] and finally an overall agreement on this amalgam. As this history makes clear, there were many divisions between the House and Senate, and their respective Committees, over the Administration's proposals and the House transformations, particularly in AFDC.[79] Although all agreed that reducing dependency was the goal, the Administration and Senate proponents securing enactment of 402(a)(23) acted on the conviction that disturbingly low levels of aid impaired capacity for independence, kept families on AFDC, and accounted for the steady increase in the rolls.[80] To be sure they were also concerned with the well-being of deprived children. The House Committee evinced several different concerns, and found the answers in controversial work, training and service programs, with coercion on the states to implement them. The final enactment was a well-defined compromise between the House and Senate. The House receded on 402(a)(23); the Senate receded on the AFDC freeze and mandatory work program. In this setting acquiescence in provisions that one political grouping or another might not approve,

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[77] Analysis of H.R. 5710.

[78] Senator Boggs noted that the Senate added 295 amendments which were not included in the House bill, and stated:

> "I would say, on behalf of the conferees on both sides of the aisle, that each one of these amendments was considered in detail by the conferees." 113 Cong. Rec. 36367 (1967).

See also *Id.*, at 36377, 36379, 33628-30.

[79] See, *e.g.*, 113 Cong. Rec. 36765, 36775, 36781-82, 36915, 36919, 36921, 36923.

[80] See note 39, *supra*.

or indeed might vociferously oppose on another occasion, is inherent in the legislative art of compromise and accord. This Court has before noted that "the fears and doubts of the opposition are no authoritative guide to the construction of legislation." *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 391 (1951). See also, *Mastro Plastic Corp.* v. *NLRB,* 350 U.S. 270 (1956). Piercing the silence of an assumed opposition in the give and take of the legislative process in reaching an accord is no less formidable or more reliable an undertaking. This is particularly true with regard to Social Security Act legislation, which, rather more than most, is the handiwork of specialist committees, dealt with by the Congress under rules restricting both debate and floor amendments. As we have seen, the final product of the House-Senate conferees in 1967 was passed as an entirety, after very limited debate. The result was predestined. Attention was focused on several controversial provisions which well took up whatever debate there was. Section 402(a)(23) was not one of these controversial provisions, for reasons that, as we shall see, are not mysterious. But both the views of the House and the Senate are reflected in the 1967 amendments and those of the Senate and the then-Administration are reflected in 402(a)(23). Neither of these views is entitled to less respect as laws of the United States. *Cf., NLRB* v. *Fruit & Vegetable Packers,* 377 U.S. 58, 65-67 (1964).

E. *The Statute as Enacted Is Not a Substantial Departure From the Past and Is Not Without Precedent in the Public Assistance Titles.*

Much of Respondent's argument focuses on the supposed revolutionary character of the requirements of 402(a)(23) and the lack of outcry to this fundamental alteration in the federal-state relationship. The argument falls with its

premise. Although §402(a)(23) is a self-evident departure from the past in dealing directly with state need standards and maximums, it does so in a manner reflecting much of the established congressional pattern. By utilizing each state's own standard of need, however inadequate that may have been, the statute continues to afford recognition to the variations in conditions among the several states. The same is seen in the acceptance of differentials between the standard of need and the amount of aid paid for those states then imposing maximums. In accepting these, Congress was also continuing the tradition of assuming greater federal responsibility for those states with lesser wealth and lower benefits.

Federal grant in aid requirements recognizing these differences and compelling maintenance of effort are not new to the federal-state relationship or the cooperative federalism embodied in that relationship. This is precisely the approach utilized by Congress but two years earlier in establishing conditions for participation in Medicaid, a federal grant in aid program identical in structure and operation to AFDC.[81] Section 1902(c) of the Act provided that no state may continue to participate in Medicaid if "the approval and operation of the plan will result in a reduction of aid or assistance . . . provided for eligible individuals under [the categorical assistance titles of the Social Security Act]." 42 U.S.C. §1396a(c).[82] That pro-

[81] Social Security Act Amendments of 1965, 42 U.S.C. §§1395-1396(g).

[82] On August 9, 1969, Pub. L. 91-56 was signed, amending §1902(c) to read "aid or assistance *in the form of money* payments" [emphasis added]. The purpose of this amendment was to make absolutely clear the intent of Section 1902(c). "The intention . . . was to prohibit the States from reducing cash payments

gram also requires that each state demonstrate "efforts in the direction of broadening the scope of grants and services made available." 42 U.S.C. §1396(e).

Thus even though New York provided a comparatively higher level of welfare assistance and supporting health services than Mississippi, while receiving less federal matching, Congress has determined that neither state may divert funds from public assistance to the Medicaid program and that both states, from quite different starting points, must establish an expansion of efforts. These requirements were not thought to work an alteration in the federal-state relationship. Indeed they were passed without controversy.[83]

Again recognizing variations among the states, while asserting federal controls over expenditures, Congress also enacted in 1965 a "Maintenance of State Effort Provision," requiring each state to increase its public assistance expenditures in the quarters beginning June 1966 (through July 1969) to the full extent that its federal appropriation had been increased over amounts afforded in a 1965 base period. It also barred states from reducing their expenditures from 1965 levels without loss of federal matching funds. Section 1317(a), 42 U.S.C. §1317(a), *repealed* effective July 1, 1968, Pub. L. 90-248, §221(d), 90th Cong., 1st Sess. (Jan. 2, 1968).

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to public assistance recipients at the time they adopted their Title XIX plans, and diverting the funds to pay for medical care." Representative Mills, 115 Cong. Rec. H 6203 (Daily ed., July 23, 1969).

[83] Only one brief mention of the maintenance of effort provision was made, and that was by Representative Mills in summarizing *all* of the provisions of H.R. 6675 (embodying all of the 1965 amendments to the Act). 111 Cong. Rec. 7201 (1965).

The welfare reform of the new Administration, while working a major change in establishing a wholly federal family security program for all families in need, adopts just this approach in determining both the amount of supplementary aid in AFDC and overall welfare expenditures that the states must assume for 5 years under the new program. As a condition of continued participation in the adult categories and the receipt of other federal monies, each state from its own funds must supplement for AFDC families (but not others) the limited federal payment to the extent its levels of aid in effect July 1969 (as adjusted for compliance with the provisions of Title IV) exceed the federal grant of $1600 for a family of four. States with July 1969 levels below the federal allotment need not supplement. Similarly all states must continue to expend at least 50% and up to 90% of their current welfare expenditures. New York's obligation continues to be far greater than Mississippi's. Here too we find a federally required maintenance of state effort determined by variations in wealth and levels of aid among the several states. 402(a)(23) is not alien to this scheme of cooperative federalism. There is no major reallocation of power or responsibility in our federal system or an infringement upon a historically sacrosanct area of state autonomy. Compare *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 513-14 (1940).

We may now place in perspective New York's "equity" argument. Congress was unmistakably aware of the existing disparities in AFDC aid among the states. These differences have been and continue to be inevitable in our federal system and therefore acceptable. Once again recognized in 1967, these differences accounted for the rejection of the Administration's proposed full need require-

ment and were thus determinative of the scope of 402(a)(23). There is no legal significance in the fact that 402(a)(23) allows Mississippi to spend less on welfare than New York.

As enacted, Section 402(a)(23) is not an answer to our national welfare problems, including the inadequacy of AFDC aid in all states and the gross disparities in levels of aid among the states.[84] Congress often deals with such large and fairly intractable problems by postponing a solution to them. 402(a)(23) does not address itself to questions of this magnitude. It is far less ambitious than the Administration's original proposal, and, as we develop later, *infra* at 101-02, leaves the states with the traditional and considerable flexibility to determine the amount of their overall resources to be devoted to AFDC. *Cf. King* v. *Smith, supra.* But that is not to say the section works no change because it leaves many problems unsolved. Viewed against its background and the concerns before Congress, the provision primarily represents an interim response, a holding action so to speak, in regard to one aspect of these national welfare problems. By stabilizing grant levels in all states as measured by its efforts during a past period, it prevents state cutbacks in payment levels which were

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[84] Senator Kuchel noted that "Despite many improvements in the Social Security Law, *all* inequities have not been removed, nor have *all* necessary improvements been made." 113 Cong. Rec. 33632 (1967).

Indeed, on the day President Johnson signed the Social Security Amendments of 1967 into law, he appointed a special commission to undertake a study of adequacy of aid under the public assistance programs and other alternatives. Commission on Income Maintenance (Heineman Commission) appointed by President Johnson, January, 1968, Economic Report of the President and Annual Report of the Council of Economic Advisors, January 1969, at 23, 164-172.

known to be disturbingly low. Its proponents, along with the Congress, were also aware of the rising AFDC caseloads in many states and the threat that that posed to levels of aid. As with any maintenance-of-effort provision the section fixes upon an existing situation, which may be unsatisfactory, and operates as a floor, seemingly *ad infinitum*, against diminished state efforts through cutbacks in aid. It plainly was not expected to last forever but rather contemplates more basic change in the future. These more fundamental changes have now been formulated and they too leave some of the problems cited by New York unsolved. They also rely on the level of a state's efforts during a base period, July 1969, as adjusted for compliance with 402(a)(23).[85]

F. *While Creating an Irreconcilable Exception to the Statute, the Recent Regulation of the Department of Health, Education and Welfare Confirms that the Statute Requires a Repricing of the Standard of Need and Maximums in Force During the January 1968 Base Period.*

The current position of the Department of Health, Education and Welfare on 402(a)(23) is before this Court in the

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[85] Section 101 of H.R. 14173, 91st Cong., 1st Sess., the Administration's proposed Family Assistance Act of 1969, would add a new Section 452(a) to the Social Security Act providing that:

"Eligibility for and amount of supplementary payments under the agreement with any State under this part shall . . . be determined by . . . application of the standard for determining need under the plan of such State as in effect for July 1969 and complying with the requirements for approval under Part A as in effect on such date (but subject to such maximums and percentage reductions as were imposed under such plan on the amount of aid paid and, then, with the resulting amount of the supplementary payment to any individual further reduced by the family assistance benefit payable under Part D with respect to him)."

form of a regulation[86] and briefs filed by H.E.W. as *amicus curiae* in *Lampton* v. *Bonin, supra,* and *Jefferson* v. *Hackney,* —— F. Supp. ——, Civ. No. 3-3012-E (N.D. Tex. 1969), which are reprinted in the Appendix to this brief. H.E.W.'s recent position, concededly representing the irreducible minimum consistent with a respect for the language, recognizes that 402(a)(23) is a specific federal limitation on the power of the states to alter their 1968 need standards or maximums. Agreeing that the statute operates upon standards of need and maximums in force during the January 1968 base period, the federal agency reads the statute to require in all states a repricing of the standard of need and to forbid elimination of the component items from that standard to offset the adjustment.

> " . . . In such adjustment a consolidation of the standard (i.e., combining of items) may not result in a reduction in the content of the standard." 45 C.F.R. §233.30(a)(2)(ii), 34 Fed. Reg. 1394 (1969).

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[86] The regulation was promulgated on January 29, 1969, to ". . . *now* make it clear that while States must update their standards, if the States do not have the money to pay according to such standards they may make a ratable reduction." 34 Fed. Reg. 1394 (1969).

It reads:

"In the AFDC plan, provide that by July 1, 1969, the State's standard of assistance for the AFDC program will have been adjusted to reflect fully changes in living costs since such standards were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted. In such adjustment a consolidation of the standard (i.e., combining of items) may not result in a reduction in the content of the standard. In the event the State is not able to meet need in full under the adjusted standard, the State may make ratable reductions in accordance with subparagraph (3)(viii) of this paragraph. Nevertheless, if a State maintains a system of dollar maximums, these maximums must be proportionately adjusted in relation to the updated standards." 45 CFR 233.20(a)(2)(ii), 34 F.R. 1394 (1969).

H.E.W. also confirms, as it must, that this adjustment is thereupon fully reflected in the amounts of aid paid in states meeting need in full in January 1968. H.E.W. *Lampton* Brief A-19. Further, states with maximums expressed in dollar amounts in the base period must adjust these amounts too in order to pass on the cost of living increase. Backsliding or avoidance in the form of imposing or reducing dollar maximums or reducing the need standard is not allowed. These propositions are sufficient to dispose of the instant case. New York may not under H.E.W.'s view eliminate items from its January 1968 standard of need, reduce yet other amounts, or create a dollar maximum to avoid the required maintenance of effort. New York has no system of percentage factors.

But the court below was influenced by H.E.W.'s assertion that the statute does not address itself to a mechanism by which a state may nullify the undertaking and we shall accordingly deal with this argument. Purporting to be relying on the canon of literal or plain meaning, H.E.W. argues that the statute does not require an adjustment to percentage factors (i.e., 50% of need) since that would result in a disproportionate increase in aid.[37] Therefore

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[37] The H.E.W. argument is as follows:

"If, however, a State had no maximums, but used percentage reductions, no change in the percentage reduction is required or precluded. If the State previously had a standard of need of $100, and paid 80% of need, the recipient would receive $80 per month. If the need standard were now raised to $120 to reflect a rise in living costs, and the State continued to pay 80% of need, the recipient would receive $96. The rise in living costs would be thus passed on to the recipient if the percentage reduction remained unchanged. It seems obvious that section 402(a)(23) does not require that a percentage reduction be 'proportionately adjusted.' If the percentage paid by the State also had to be raised by the rise in living costs, in the example above, the State's need standard

ratable percentage reductions are not maximums, the statute does not operate upon them, and the states are free to do whatever they will with them. Since some states in 1967, albeit a distinct few, paid less than full need through the imposition of percentage factors, Congress sculpted an exception from the operation of §402(a)(23) for this mechanism."

Even as an exercise in literalism, the distinction between dollar maximums and percentage factors applied to the standard of need (or budgetary deficit) cannot withstand analysis. To return to the statute, it states that "any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted." By definition a maximum in this context is a ceiling on the amount of aid paid, providing an amount that is less than the standard of need. The standard of need is a monetary amount, so too are "any maximums," lest we deal with apples and pears. A maximum literally means the "greatest quality or value attainable" or "an upper limit allowed by law or other authority."[10] A percentage factor is a method of deriving this monetary ceiling, as would be a

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would be raised by 20% to $120 and the State would pay 96% of need (instead of 80%), resulting in a payment of $115 (instead of $80), a rise more than double the 20% rise in living costs. In some States, such an adjustment in the percentage reduction could require payment of more than 100% of need." H.E.W. *Lampton* Brief A-19, A-20.

[9] As H.E.W. puts it,

"In short, it appears that §402(a)(23) just does not refer to percentage reductions. It does not require that they be adjusted, or that they remain the same, nor does it preclude changes in their amount." H.E.W. *Lampton* Brief A-20.

[10] *Webster's Third New International Dictionary of the English Language*, p. 1396 (1961).

fraction, ratio and so on. Aid to families is not afforded in percentages or fractions; it is, after all, money. Of course the statute does not require an adjustment to the percentage factor. It requires that "any maximums . . . on the amount of aid paid to families *will have been proportionately adjusted.*" The maximum amount of aid paid under a percentage system "will have been adjusted" upon the required repricing of the need standard, so long as the percentage factor is kept constant. To illustrate, assume that the standard of need is $100 of which a state pays 50% ($50) and the cost of living factor is 10%; after the adjustment of the need standard, the maximum imposed on the amount of aid is $55.00. That maximum has been proportionately adjusted and the terms of the statute indeed make sense in respect to the operation of percentage factors. Although H.E.W. concedes that there has "been confusion about the two methods" and "that the term maximum . . . has been used to refer to both methods," H.E.W. *Lampton* Brief A-23, its clear understanding of the distinction between the two is not reflected in any statute of Congress or any regulation thereunder until after the enactment of 402(a)(23).

Significantly the distinction is also not reflected in the legislative evolution of 402(a)(23). The Administration's proposal to require payment of need in full concededly covered all states then utilizing dollar maximums, percentage factors, or both, as is often the case.[90] Indeed, the Administration submitted with its proposal two charts, one expressing the record of the 33 states utilizing one or more of these mechanisms as a percentage of their need standard, the other expressing in dollar figures the "highest

[90] See note 30, *supra*.

monthly amounts payable for basic needs," including those "amounts resulting from the application of a percentage or flat reduction to the amount of determined need." [91] This interchangeable use of percentage or dollar denotations makes manifest that we are dealing with modes of expression for descriptive purposes and not some meaningful distinction between mechanisms for paying less than state-recognized need.

The Administration assuredly did not distinguish between them in explaining the necessity for requiring payment of full need. The Senate Committee acted on this record in specifically substituting a required adjustment of "any maximums" for the meeting need in full proposal. This substitution plainly was intended to require a proportionate living cost adjustment in those 33 states then not meeting need in full, and not an adjustment fortuitously excluding 11 of those states then using percentage factors. Neither dollar maximums nor percentage factors were particularly new in 1967. At no time did H.E.W., or anyone else, suggest that percentage factors were excluded from the provision, though their asserted omission totally nullifies the exercise. The Committee analysis of the provision, and the companion provision for the adult increase through adjustment of "any maximums," contains no such distinction. Are we to assume that Congress carved out an exception in the adult provision also by failing to specify percentage factors in requiring an adjustment of "any maximums"? [92] The expressed concern of the proponents of 402

[91] Analysis of H.R. 5710, p. 37.

[92] Judge Hays finds weighty significance in variations in the language used in the Conference Report in explaining the Senate Committee's proposal for an increase in the Adult programs and

(a)(23), along with the adult provision, was with "Increasing Income Of Recipients," not in playing a cipher game, with a year and a half in which to play it. Congress in 1967 well understood that maximums referred to amounts

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the AFDC provision. In regard to the Adult provisions, the Conference Committee read the Senate Amendment

> "to require each state to adjust its standards for determining need, the extent of its aid or assistance, and the maximum amount of the aid or assistance payable under its plans . . . so that the total aid or assistance and other income per recipient will be no less than $7.50 per month above the total aid or assistance and other income per recipient under the standards and maximums applicable on December 31, 1966 . . . ."

The Committee read the Senate's AFDC provision to require that

> ". . . by July 1, 1969, and annually thereafter, each State (under its plan for AFDC approved under Title IV) must adjust its standards so as to reflect current living costs and make proportionate adjustments in any maximums on the amount of aid." Conf. Rep. No. 1030, pp. 62-63.

It is unlikely that the minor difference in language was intended to reflect a difference in the substance of the two provisions. If a technical difference was perceived, however, the additional language describing the Adult provision was undoubtedly intended to close up a possible loophole by preventing the states from usurping the Social Security increases through adjusting downward their exempt income standards. Such standards, by defining exempt income, do determine the extent of supplementary aid or assistance the States provide. The central purpose of the Adult proposal was to pass along the increase in Social Security benefits to the adults who receive supplementary aid or assistance under the Adult titles. See Summary of Social Security Amendments of 1967, Joint Publication, Senate and House Committees, 90th Cong., 1st Sess. at 19, describing this provision as "Pass Along." See note 58, *supra*. The AFDC provision was not inspired by this consideration, since few AFDC families receive Social Security. Until the federally-required income exemptions in the 1967 amendments, few states provided standards for exempting income of AFDC families. Hence, the AFDC provision, unlike the Adult proposal, was not concerned with a state income standard for determining "the extent of its aid or assistance."

of aid, and not to the methods by which such amounts are derived. Indeed, the only congressional use of the term maximum is in reference to the federal dollar ceiling on participation, which significantly is derived through the application of a fraction and a percentage factor."[33]

Under H.E.W.'s view the statute requires a great deal during the considerable period afforded for compliance—a cost of living study; adjustment of need standards, which must be left intact; adjustment of dollar maximums, which may not be reduced—and rather nothing at all: the states may set any level of payments whatsoever, the identical position they were in before 402(a)(23). Recognizing that legislation has an aim, seeks to obviate some evil, or effect some change in policy, *Uptagrafft* v. *United States,* 315 F. 2d 200, 204 (4th Cir.), *cert. denied,* 375 U.S. 818 (1963), and that it is not easy to suppose "any part of a statute to be without meaning," *General Motors Acceptance Corp.* v. *Whisnant,* 387 F. 2d 774, 778 (5th Cir. 1968); see, *e.g., Platt* v. *Union Pac. R.R. Co.,* 99 U. S. (9 Otto) 48, 58 (1878), H.E.W. seeks support in other "significant effects" for this federal enactment.[34] There are effects to this exercise, but hardly ones that the proponents or assumed opponents in Congress could conceivably have desired. They reveal the bankruptcy of this position.

First, it is said, that "if the need standard is raised to reflect higher living costs, additional individuals become eligible for ADC . . . more individuals with income will now be eligible." H.E.W. *Lampton* Brief A-21. This is a

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[33] 42 U.S.C. §603(a)(1).

[34] H.E.W. *Lampton* Brief A-21.

non sequitur, as H.E.W. recognized in defending "compliance" in the State of Texas, which faithfully adhered to the H.E.W. regulation. In changing over from a system of dollar individual and family maximums to a percentage factor applied to the standard of need, approximately 2,500 families were eliminated from the AFDC rolls in that State, and H.E.W. eliminated this argument from its brief in *Jefferson,* A-39. As H.E.W. accepts in the Texas case, no federal law or regulation prohibits use of the budgetary deficit, after application of the percentage factor to the standard of need, to determine eligibility for aid.[95] Moreover, a required increase in the AFDC rolls was the one thing that the Congress did not specifically intend in 1967. The federal freeze, the work program, income exemptions limited to persons actually receiving AFDC,[96] and not other eligible individuals,[97] were conceived as weapons to deal with the steady rise in AFDC rolls. The freeze in particular was intended to coerce the states to deal with the growth in the number of children in the absent parent category.[98] Indeed, the proponents of 402(a)(23) conceived of

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[95] Eligibility for services with federal matching depends, of course, on eligibility for financial aid. 45 C.F.R. §220.61.

[96] 42 U.S.C. §602(a)(8)(A).

[97] 42 U.S.C. §602(a)(8)(D); See also 42 U.S.C. §608(a)(C)(i), (ii).

[98] During the initial consideration of H.R. 12080 by the House, Representative Mills reported on the floor of the House that the freeze "would give the States an additional incentive to make effective use of the constructive programs which the bill would establish." 113 Cong. Rec. 23055 (1967). When the Conference bill was being debated, Representative Mills was more blunt in defending the "freeze."

"It is there to get the States to act on the other provisions of the bill requiring them to do something to reduce depen-

it as a weapon to reduce dependency by restoring capacity for self-sufficiency through more adequate grants. They certainly did not look to see yet further reductions in prevailing levels of aid by increasing the total number of eligible persons. The stress on a variety of social and rehabilitative services was not to invite people to join the AFDC rolls, but to get them off.

"In addition," H.E.W. states, "the updating of the need standards will make the standards more realistic in light of current conditions. This will give important information about the needs of assistance recipients to State agencies, State legislators and officials and the public." H.E.W. *Lampton* Brief A-21. But 402(a)(23) is a curiously unwieldy device to convey the not too obscure fact that living costs are rising. As H.E.W. recognizes "to make adequate assistance payments, a state will use a standard which includes all items needed by the recipients, priced at current levels in accordance with some recognized low income budget." H.E.W. *Lampton* Brief A-16. Accepting the state's standard with whatever items and prices it had in January 1968, §402(a)(23) sheds no information on these elements.

Finally it is argued that

> "To the extent that states with inadequate funding of their public assistance programs turn to percentage reductions rather than maximums, there will be a more

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dency and to take people off welfare who should not be there. It is as simple as that. We passed legislation in 1962 designed to take persons off the welfare rolls but the results obtained within the States have been less than startling. Now we are furnishing a prod to obtain some results from the State welfare agencies." *Id.*, at 36368.

equitable system of distributing the funds, without the arbitrariness of maximums . . . .

"While maximums often result from insufficient funds, they have an independent arbitrary aspect which may limit payments even where funds are otherwise adequate." H.E.W. *Lampton* Brief A-21, A-32.

This argument is founded on several unsupportable premises. First, it proceeds on the assumption that states may not make ratable percentage reductions on the adjusted dollar maximums, individual or family. Why not? After all the essence of H.E.W.'s position is that 402(a)(23) allows free play to the use of percentage factors and their application to the adjusted need standard nullifies the required adjustments quite as much as their application to any adjusted dollar maximums. Nothing in 402(a)(23), as read by H.E.W., prohibits this result.

Moreover, there is nothing inherently more arbitrary about an individual dollar maximum than a percentage factor applied to the standard of need or budgetary deficit. The arbitrariness, in the sense of inadequacy or failure to meet recognized needs, inheres in the amount of aid, not the method of determining such amount. And both devices continue to limit aid below that of need even where funds are otherwise adequate.

To the extent that states do turn to percentage factors applied to the budgetary deficit (i.e., need less income) in order to maintain or decrease their 1968 level of expenditures, there is a redistribution of the same or less welfare resources among a larger number of families. Those with incomes above the level in the previous individual maxi-

mums now receive some aid; those with no income, the substantial majority of AFDC recipients, receive *less* aid than before. Surely, Congress was not seeking a major redistribution of welfare resources at the expense of needy families at the very bottom of the income scale.

Unlike individual maximums, family maximums do bear a distinct element of arbitrariness insofar as they deny aid entirely to additional members of the family over a specified size. See *Williams* v. *Dandridge,* 297 F. Supp. 450 (D. Md. 1969), *prob. juris. noted,* 38 U.S.L.W. 3115 (October 13, 1969), *Dews* v. *Henry,* 297 F. Supp. 587 (D. Ariz. 1969), *Westberry* v. *Fisher,* 297 F. Supp. 1109 (D. Me. 1969). But Section 402(a)(23) itself certainly does not forbid their use by requiring an adjustment to them, *cf., Williams* v. *Dandridge,* 297 F. Supp. at 454, and ratable percentage factors in no way discourage their use. Operating as an additional ceiling on the amount of aid to be paid, such maximums are often used now in conjunction with percentage factors. A modest cost of living adjustment to a family maximum does not diminish their utility in reducing state expenditures. Nor does such an adjustment affect their distinct element of arbitrariness in denying aid to additional children in a family.[39] There is nothing in the

[39] Embroidering on the H.E.W. position, Judge Hays finds adjustment of a family maximum the sum total of the intended effect of 402(a)(23). Support for this view is found in the recent litigation challenging the arbitrariness of family maximums on constitutional grounds and the use of the word "family" in reference to any maximums on the amount of aid paid to families. Why Congress dealt with constitutional attacks on family maximums, then just beginning, by requiring an adjustment that does not alter the constitutional issue is not clear. But it is clear that aid under Title IV, entitled Aid to Families with Dependent Children, is money payments to families with dependent children. Section 402(a) of the Act, 42 U.S.C. §602(a)(1) was amended in

legislative history to support the notion that Congress was focusing on family maximums rather than on states that paid less than full need. The H.E.W. interpretation cannot be reconciled with the language or any conceivable purpose behind the enactment. It is therefore wanting.

C. *New York's Elimination and Reduction of Base Period Amounts Used to Determine Needs to Accommodate Its 1969 Welfare Cuts Violates 402(a)(23).*

The District Judge's finding of fact that §131 enacts "drastic cuts in both the standard of need and level of payments to meet the exigencies of a state budget" (209) is amply supported by the record, including the evidence submitted by New York. These findings were not disturbed on appeal; indeed New York raised no additional argument in respect to the summary judgment. Judge Feinberg, upon re-examination, affirmed this finding, stating:

> "No amount of linguistic acrobatics or technical rationalizations can disguise the glaring fact that the state is critically reducing AFDC standard of need and payments" (251).

But since New York has heretofore urged a battery of confusing arguments to becloud this fact, we shall deal with them again.

We do not dispute that 131-a is based upon the previous standard of need. It is the transformation of that base

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1962 by Pub. L. 87-543, §104(a)(2) to substitute "aid and services to needy families with children" for "aid to the dependent children" in the catch line. See also 42 U.S.C. §§606(b), 607(b)(1), 608(b).

period standard through reduction of amounts and elimination of items to accommodate the desired 13 percent slash in AFDC expenditures that offends the requirements of 402(a)(23).

Section 131-a transforms the standard of assistance in force on January 1968, as repriced in May, 1968, as follows:

1. The amounts used to determine needs of individuals in January 1968 were differentiated ones based upon the size of family and the age of the oldest child, with particularly greater step increases in amounts for teenage children (and adults) in recognition of their greater personal requirements for food, clothing, educational and social necessities.[100] These are now eliminated in 131-a, and all families are brought down to the previous level of the mean-age category for families of that size, thereby abolishing for most families with older children (save those with seven or eight persons) the significantly larger step increases for teenage children. Some families with children below the mean age obtain modest increases under this redistribution,[101] while AFDC families with children above or at the mean age receive an immodest decrease.

2. The flat cyclical grant providing each recipient in New York City, regardless of age, with $100 annually ($8.33 per month) for items of clothing and home furnishings is eliminated.

3. The corresponding amounts for clothing and home furnishings outside New York City, afforded upon the

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[100] See 18 N.Y.C.R.R. §352.4, repealed.

[101] The amounts for the mean age category are then slightly reduced to maintain constant intervals and no additional provision is made for families with older children.

occasions of need rather than in a flat amount quarterly, are abolished; no amount is added to the standardized grant for these items.

4. With the exception of rent and fuel, all of the amounts administered as critical supplements to the bi-weekly grant for expenses incidental to maternity and infancy, medically-necessitated diets and telephones, relocation, school lunch allowances, travel expenses for employment or medical reasons, including visits to children in hospitals and institutions, and others are eliminated; no amount is added to the standardized grant for these needs.[102]

5. The annual May repricing of the need standard is by-passed in this year of spiraling inflation; the Administrator is merely to report to the Legislature in 1970 the changes in living costs since 1968. N.Y. Soc. Serv. Law §131-a(5). The above four changes adversely affect all AFDC families in the state, regardless of family composition.[103]

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[102] See 18 N.Y.C.R.R. §352.4.

[103] In recognition of the extraordinary hardships resulting from the elimination of supplements, and perhaps in response to political pressures, the Respondent recently instituted a "special necessity grant" of $8.00 per month for individual recipients or $5.00 per month for a recipient living with his family, in the adult categories of aid, despite the embracing language of Section 131-a ("these amounts shall be deemed to make adequate provision for all items of need . . . exclusive of shelter and fuel.") *New York Times*, September 24, 1969, p. 1, col. 7. AFDC children, with their greater numbers and lesser political influence, were wholly denied the benefit of this recognition. Such discriminatory treatment of AFDC children is not unusual, in New York and elsewhere.

In Louisiana, for example, favored treatment was recently afforded recipients of Old Age Assistance; administrative reduction of their grants was prohibited without prior legislative approval. Discrimination against AFDC recipients was evidenced by an ad-

That Section 131-a serves its purpose is seen not only in the reduced AFDC budget but in its impact on the Petitioners before this Court. Appellee Duffy's monthly family grant is reduced $174.40 under the new law; the family of Catherine Folk receives $129.00 less a month. Sophia Brom, a diabetic, and Marjorie Miley, who has tuberculosis, are denied entirely amounts for medically-necessitated special diets and telephones. The overall effect on Petitioners is shown in the table below.[104]

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ministrative reduction confined to the AFDC program subsequent to this legislation. See *Lampton* v. *Bonin, supra.* The influence of welfare recipients apparently varies as the "public image of the character of the recipients" changes from "respectable, aged, white literate citizen in his 'golden years' " to "an uneducated, unmarried Negro mother and her offspring." Steiner, *Social Insecurity: The Politics of Welfare* 3 (1966).

[104]

Plaintiff	*Previous Grant*	*Maximum Under 131-a*
Rosado	$280	$254
Hernandez	$218	$162
Miley	$535	$469
Abrom	$406	$340
Gathers	$382	$340
Lowman	$396	$383
King	$482	$426
Folk	$337	$208
Phillips	$314.40	$224
Duffy	$563.40	$389

The *New York Times* reported that:

"Slowly, a kind of alarm appears to be building among the first of those expected to suffer reductions under the sharply revised system of relief. . . . A blind man on the East Side has seen his daily-needs budget cut by more than half, including the elimination of 24 cents a day to feed his guide dog.

A crippled polio victim in Harlem whose previous $191-a-month allotment has been cut by $60, has missed physician's appointments because his car fare grant was eliminated. . . .

A welfare mother who has worked for almost two years, has earned a high school diploma and hopes for a career as a social

The multitude of sundry defenses Respondent tendered below cannot withstand analysis. The broad argument that 402(a)(23) does not apply to New York since that state pays "the highest level of benefits per AFDC recipient" ignores the import of 402(a)(23) and is accordingly addressed to the wrong forum. *Cf., Snell* v. *Wyman,* 281 F. Supp. 853 (S.D.N.Y. 1968) *aff'd* 393 U.S. 323 (1969). It is precisely the argument that Congress did not accept in 1967 when it enacted §402(a)(23) without the payment of full need requirement.

The second defense, offered below, that 402(a)(23) "expires July 1, 1969, which is coincidentally the effective date of New York's 131-a," warrants little discussion. Since the federal provision requires that the adjustments "will have been" effectuated by July 1, 1969, it is plain that the repriced schedules are commanded to be in force on and after July 1, 1969. Plainly 402(a)(23) does not require adjustments before July 1, and these required adjustments are not an exercise in futility.[103] See *Lampton* v. *Bonin,* 299 F. Supp. 336 (E.D. La. 1969); H.E.W. *Lampton* Brief A-11.

New York then argues, and Judge Hays appears to agree, that 402(a)(23) requires no increase in aid paid to families in states without any maxima, such as New York. In those states the statute only requires an adjustment to the standard of need, which, it is said, merely determines

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worker has suffered a cut of $140 a month, mainly in fees for the baby-sitter who tends her five children and one grandchild.

'This is insane,' said the welfare mother, Corrine Greene. 'I'm trying to make a career and get off welfare and those legislators are doing everything they can to keep me on.'" *New York Times,* July 26, 1969, p. 27, col. 4.

[103] See note 52, *supra.*

eligibility for aid but not the amount of aid. That is simply untrue. In states without any maxima, the standard of need (the amounts used to determine the needs of individuals) is the sole determinant of the amount of aid to be paid. Repricing the need standard under 402(a)(23) perforce results in the required adjustment in the amount of aid paid. Congress went on to require the proportionate adjustment to maximums to insure that the repricing increase would be passed on to recipients in states then paying less than full need. It certainly was not intended to exempt states paying full need from the requirements of the statute. In light of these two requirements, both the creation and reduction of any dollar maxima are equal violations of 402(a)(23). 45 C.F.R. §233.20(a)(2)(ii); H.E.W. *Lampton* Brief A-32; H.E.W. *Jefferson* Brief A-43, A-44.

Respondent also asserted that 402(a)(23) does not apply to certain components of the standard of need existing on July 2, specifically those eliminated by Section 131-a. The contention seems to be that these items were not part of the AFDC standard of need in force in January 1968, but rather were in excess of New York's standard and therefore "totally gratuitous." That assertion is plainly belied by the operation of the New York plan, federal regulations and the character of the items now eliminated or reduced. New York's definition of its own standard of need prior to 131-a quite plainly covered *all* these items:

> "An individual or family shall be deemed 'in need' when a budget deficit exists or when the budget surplus is inadequate to meet one or more nonbudgeted special needs required by the case circumstances and included in the standards of assistance." 18 NYCRR §353.1(c). See also 18 NYCRR §353.1(d). ("All items of basic

maintenance and all items of special need required by case circumstances" comprise the recipients' "estimate of regular recurring need.")

Monetary amounts were assigned to these items and the conditions for their issuance were spelled out in New York's regulations as a part of its federal AFDC plan, pursuant to the federal requirement that

> "If the state agency includes special need items in the standard (a) describe those that will be recognized, and the circumstances under which they will be included and (b) provide that they will be considered in the need determination for all applicants and recipients requiring them." 45 C.F.R. §233.20(a)(2)(v), 34 Fed. Reg. 1394 (1969).

Significantly, New York claimed and received federal matching funds for all the substantial amounts expended in meeting these needs. Such federal participation is available only where the "income of a needy individual, together with the assistance payment, *do not exceed the state's defined standard of assistance.*" 45 C.F.R. §233.20(3)(vii), 34 Fed. Reg. 1394 (1969) (emphasis added). See also H.E.W. Handbook, Pt. IV., §3120(2). Pursuant to the federal hearing requirement for "any individual whose claim for aid to families with dependent children is denied," 42 U.S.C. §602(a)(4), New York systematically afforded such hearings when special grants were reduced or denied and of course when the age differentials were not met. When New York sought to administer amounts for clothing and home furnishings as a flat quarterly grant in New York City, it sought and obtained from H.E.W. a special exemption from

the federal requirement that the standard of need must be uniformly administered throughout the state.[106] Indeed the Congress endorsed the use of special need supplements in providing an averaging formula for federal matching, 42 U.S.C. §603(a), specifically to "enable the states, with federal participation, to meet more adequately the unusual needs of individuals."[107] 1958 U.S. Code Cong. & Admin. News p. 4260.

As established in the uncontroverted evidence in this case, special grants in New York, and the greater amounts for older children were not luxuries. The greater requirements of older children for food, clothing and education are simply

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[106] Both New York and H.E.W. have specifically recognized special grants as part of New York's AFDC standard of need. When New York recently desired to administer grants for clothing and home furnishings as a flat cyclical grant rather than as a special grant in New York City, it sought and obtained a waiver from H.E.W. under 42 U.S.C. §1315 of the federal AFDC requirement that the state standard of need must be uniformly administered throughout the state. H.E.W. approved the "demonstration project" because grants for articles of clothing and home furnishings were retained in New York's AFDC standard of need, but simply administered on a different basis in New York City. Were these items not part of the AFDC standard of need, but, as New York now claims for these very items, "totally gratuitous on the part of the State," this proceeding under the Social Security Act would have been wholly inappropriate, indeed improper.

[107] H.E.W. Secretary Marion Folsom testified before the Committee on Ways and Means as follows:

> "States would have much more flexibility to provide payments more in line with wide variations in individual need. [The] matching limit might be more readily recognized for what it should be: a means of regulating the total federal share, rather than a suggestion of what should be the ceilings for individual cases."

House Committee on Ways and Means, Hearings on All Titles of the Social Security Act, 85th Cong., 2nd Sess. (1958), p. 6.

facts of subsistence life, as reflected in all low income budgets, including the Government's low-cost food plan on which New York places such heavy reliance.[108] Nor are these amounts, based on two-year step intervals, windfalls for other children in the family. Special or supplemental grants are merely a different method for meeting basic needs of children and their parent, as illustrated by the very items then administered as special grants[109]—and the reasons for such administration.

Fine differentiations are inherent in the barren field of welfare budgets, as Congress has recognized. Where certain personal requirements, as basic as any other, are thought not to be universal or constant, New York (with other states) tailored the payment to the specific occasion and amount of need, as indeed it still does for rent, fuel and homemaker service.[110] Supplements are so administered to avoid any possibility of "excess" or flexibility in the spartan welfare grant. To be sure, special grants were only given when necessity was shown, but a showing of need is the fundamental condition for any grant under AFDC. What New York is really saying is that it no longer will recognize and provide for needs that were met in January 1968, and the reasons have nothing at all to do with a determination that these needs no longer exist. Were it

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[108] The amount set forth for expensive staples, *i.e.*, meat, fruit, vegetables, is three times greater for teenage children than for younger children. U.S. Bureau of Labor Statistics, 3 Standards of Living for an Urban Family of Four Persons, Bull. No. 1570-5 (March, 1969).

[109] See *supra* at 12-13, notes 4-11.

[110] 18 NYCRR §§352.4(a)(5), (6), 352.5(b). In providing for rent and fuel, the Department must determine in each case that the premises are suitable and that the amount is within Department limits.

accepted that §402(a)(23) applies only to what a state now deems necessary, the rest being "gratuitous," the federal maintenance of effort requirement would be emasculated. New York's determination does not depend on whether the need was met by a regular or supplemental grant (New York applies the same reasoning to both here), or on whether the need exists, but plainly rests upon the intent to reduce AFDC grants. This is precisely what 402(a)(23) forbids.

New York's incantations of administrative efficiency and equity among recipients are specious and irrelevant. Diets or telephones for diabetics or cardiac victims, transportation for persons searching for employment or visiting hospitalized children, school lunches for welfare children, expenses for infancy, did not lead to a "wide disparity . . . in favor of the more aggressive or sophisticated welfare recipients." Respondent's Brief in Opposition to Petition for Certiorari, p. 13. The only conceivable components involving broad caseworker discretion or frequent necessity were clothing and home furnishings, and these were administered as a *flat* cyclical grant in New York City, now eliminated in 131-a. There is no administrative efficiency (save for cost *per se*) in elimination of objectively verifiable needs (pregnancy, childbirth, and so on), elimination of the two-year age differentials (countless adjustments in the grant are required yearly, including recertification every three months, see *Kelly* v. *Wyman*, 294 F. Supp. 887 (S.D.N.Y. 1968) *prob. juris. noted sub nom. Goldberg* v. *Kelly*, 37 U.S.L.W. 3399 (April 21, 1969),[111] or the elimination of the

[111] 18 NYCRR §351.23.

"flat" grant in New York City,[112] where 80% of AFDC children reside.

But more fundamentally, 402(a)(23) has little to do with the manner of administering a grant and does not impose an administrative straitjacket. As the H.E.W. regulation under 402(a)(23) recognizes, a state may consolidate its standard to simplify administration, but such "consolidation . . . (*i.e.*, combining of items) may not result in a reduction in the content of the standard." New York has not consolidated its standard of need; it has eliminated the needs formerly met with supplements, while adding nothing to the regular grant to meet those needs. Similarly, it has reduced those amounts to meet the basic needs of older children. Section 131-a does not provide "flat" grants for any of these components of need, but rather no grant at all, and this constitutes the "enlightened" flat grant concept in New York. New York has severely reduced welfare

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[112] The letter from Mr. Fred Steineger, an official of the Bureau of Family Services in H.E.W. (Doc. No. 49), quoted at length below as authority for a federal mandate of simplification, is plainly not an expression of the viewpoint of H.E.W., no less a regulation of that agency. But that letter recognizes that the elimination of age differentials and assistance "for personal items [is difficult] because these costs vary by age of family members." The letter further states that the provision for special grants may be equitably eliminated only when "realistic money amounts in the standards of requirements for basic need" are provided. The letter further recognizes that no basic welfare allotment can be sufficiently adequate to justify the elimination of all non-universal and non-recurring items of need.

As Mitchell Ginsberg, now Commissioner of the New York City Human Resources Administration, testified below:

> "... a real flat grant system . . . would be dependent on the fact that it [the recurrent grant] was substantially higher than what we have at the present .... I submit there can not be any meaningful discussion of welfare [the flat grant] without discussion of the level of the grant" (49, 50).

grants to meet the exigencies of a state budget in violation of an act of Congress.[113]

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[113] The argument that New York has not reduced rent is irrelevant, that being only one of the amounts used to determine the needs of individuals. Also irrelevant is its assertion that some families benefit as a result of the transformed need standard. Any overall reduction in welfare expenditures entails a change in the need standard, and, where used, maximums. Such changes often result in some families receiving modest increases and others receiving decreases. See, *e.g.*, the discussion in *Jefferson* v. *Hackney, supra,* and *Lampton* v. *Bonin, supra,* of the effects of the Texas and Louisiana cutbacks respectively. Section 402(a)(23) is concerned with the maintenance and repricing of the amounts used to determine the needs of individuals, not with the redistribution of welfare resources. It plainly does not refer to some individuals and not others, though it also does not bar an increase, over and above its required maintenance of effort, for any individuals and families on AFDC. New York may seek whatever equity it wishes, without reducing levels of aid in the process.

Similarly, New York may not satisfy the statute through providing "many items," "such as moving, homemaking, *etc.*," Respondent's Brief in Opposition, p. 13, on a purchase of services basis where there is a special need. While undercutting the tedious argument on the rationale for elimination of special grants, the "etc." is without meaning. There simply has not been restoration of the supplemental grants on a purchase of services through vendor payments to the supplier (156, 157). More fundamentally, Section 402(a)(23) deals with aid paid to families with dependent children. Under the federal AFDC statute, "aid to families with dependent children means *money payments* with respect to . . . a dependent child or dependent children." 42 U.S.C. §606(b). Purchase of services, with direct payment to vendors, does not comply with the federal requirements and H.E.W. regulations designed to protect the "amounts of aid paid" under the AFDC program. See H.E.W. Handbook, Pt. IV, §5120, *et seq.;* 45 C.F.R. §233.20(a)(ii), 34 Fed. Reg. 1394 (1969). A state may not claim federal reimbursement for the provision by vendor payments for purchase of services of "subsistence and other assistance items" normally included in the standard of need, unless there has been a finding in the individual case of mismanagement. Such payments, even with the finding, may not exceed ten percent of the families in each state receiving aid to dependent children. See, 42 U.S.C. §§606(b)(2)(A), (B), (E); 603(a)(5). See also §605. 45 C.F.R., Pts. 220 and 226, 34 Fed. Reg. 1394 (1969). Similarly, for these reasons, New York's proposed food stamp program, day care center program, work incentive program, are irrelevant to this case.

II.

Both pendent and independent bases of jurisdiction compelled prompt adjudication in the United States District Court of the validity of state action under paramount federal law.

Our opening statement sets forth the succession of events in the District Court. The proceedings there were complicated to be sure, but they culminated in a determination on the merits after a full and fair hearing of the issues. These issues, from the start of the case, were solely ones of federal law. When the equal protection claim was deemed moot, the remaining question was the meaning of a federal statute on a point of such enormous consequence to both Petitioners and Respondent that prompt disposition was recognized by both parties as absolutely essential. Nonetheless, the Court of Appeals held this federal issue not properly to be heard in federal court. Independent jurisdiction is lacking and pendent jurisdiction is abused.

That the federal courts have no independent jurisdiction to adjudicate a suit brought under 42 U.S.C. §1983 to vindicate federal statutory rights where the amount of federal funds in controversy is several hundred million dollars and where the harms about to be inflicted upon children asserting such rights are malnutrition, stunted growth and impaired educational performance, is a startling proposition. To say this is true is to state a major defect in the allocation of adjudicatory powers within our federal system, which is the function that federal jurisdiction-conferring provisions perform. But it is not true. In so holding, the court below erroneously rejected several independent jurisdictional bases for the statutory claim, 28 U.S.C. §§1331, 1343(3), and 1343(4).

Even more startling and novel is the court's holding in the circumstances of this case that it was an abuse of discretion for District Judge Weinstein to exercise pendent jurisdiction to vindicate these federal statutory rights once the constitutional claim had been deemed moot. We know of no other case in the federal annals of two centuries holding, or suggesting, that it might be an abuse of discretion to decide a purely federal claim based on a federal statute merely because jurisdiction is pendent rather than independent. Because the majority judges of the Circuit Court treated this point at length, we begin with it. Subsequently we show that independent bases of jurisdiction exist.

A. *The Federal District Court Had Jurisdiction to Decide the Social Security Act Claim, and Properly Did So.*

1. The District Judge Had Power to Decide the Pendent Claim.

Guided by the liberal joinder provisions of the Federal Rules of Civil Procedure, this Court in *United Mine Workers* v. *Gibbs,* 383 U.S. 715 (1966) set forth considerably broadened standards of pendent jurisdiction. Under these standards, as no judge below doubted, the district court had jurisdiction to hear the concededly substantial constitutional issue, over which 28 U.S.C. §1343(3) clearly vests jurisdiction, and also had pendent jurisdiction over the Social Security Act claim; cf. *King* v. *Smith,* 392 U.S. 309 (1968). Both claims sought injunctive and declaratory relief against the very same schedule of grants set forth in §131-a, adopted March 31, 1969. Establishment of both claims rested on similar proof of the relationship between the revised and prior schedules and costs of living. Thus the claims "derive from a common nucleus of operative fact" and are "such that [plaintiffs] would ordinarily be

expected to try them all in one judicial proceeding." *United Mine Workers* v. *Gibbs, supra,* 383 U.S. at 725.[11a] Indeed, but for its determination of mootness, the three-judge court should properly have exercised that pendent jurisdiction to decide the statutory claim in preference to the constitutional claim, thereby avoiding unnecessary resolution of constitutional issues. *King* v. *Smith, supra; Solman* v. *Shapiro,* 300 F. Supp. 409 (D. Conn.), *aff'd* 38 U.S.L.W. 3125 (October 13, 1969).

The power of the district court to decide the pendent federal statutory claim did not expire when the constitutional claim which served to confer federal jurisdiction was deemed moot. As federal courts have power to decide pendent state law claims even after dismissal of the federal claim which conferred jurisdiction, *Moore* v. *New York Cotton Exchange,* 270 U.S. 593 (1926), *Hurn* v. *Ousler,* 289 U.S. 238 (1933) (dictum), their power to decide pendent federal claims in similar circumstances is clear *a fortiori. United Mine Workers* v. *Gibbs, supra* states that the question of *power* is to be decided on the pleadings, and if "plaintiffs claims are such that he would ordinarily be expected to try them all in one judicial proceeding . . . there is *power* in federal courts to hear the whole" 383 U.S. at 725.

After deciding the mootness of the constitutional claim, the three-judge court did not exercise its pendent jurisdiction over the statutory claim, stating *per curiam*:

[11a] There was nothing "curious" in the joinder of families from New York City and Nassau County. Both were aggrieved by the new statutory schedules and the equal protection relief sought for Plaintiffs from Nassau County in no way threatened any further reduction in grant levels for New York City. The Respondent Commissioner was barred by statute from reducing the legislative schedules for New York City, N.Y. Soc. Serv. Law §131-a.

"We need not consider the now academic question of whether the three-judge court might, in the exercise of its pendent jurisdiction, have decided the alleged statutory issue either before it considered the alleged constitutional issue or after it decided the constitutional issue against the plaintiffs. *Cf. King* v. *Smith*, 392 U.S. 309, 312 n. 3 (1968). Under the circumstances of this case there is no reason for continuing the three-judge court" (135).

However, the case was referred back to Judge Weinstein "for such further proceedings as are appropriate" (135). Plainly the terms of remand cannot be received as a three-judge determination that pendent jurisdiction should not be exercised by the single judge. No more pressing issue existed in the case, and this choice of language, subscribed to by Judge Weinstein, is patently designed to bypass that issue by leaving it to the discretion of the regular single-judge district court.

Following the remand, the District Judge had power to decide the remaining claim, regardless of whether an independent jurisdictional basis for it existed at that point.

We therefore disagree with Judge Hays' view, not concurred in by Chief Judge Lumbard, that the three-judge

"court is the only court which ever had jurisdiction over the constitutional claim. Since the single judge at no time had jurisdiction over the constitutional claim, there was never a claim before him to which the statutory claim could have been pendent" (221).

The premise is erroneous. 28 U.S.C. §1343(3), the jurisdictional basis for the constitutional claim and through it the pendent statutory claim, vests jurisdiction, as do the other provisions of the Judicial Code, *e.g.* §1331, in

the United States District Courts, not in any judge or judges thereof. At the outset of the case, Judge Weinstein, the initial District Judge sitting as the district court pursuant to the rules of court, was empowered to exercise the jurisdiction of the court. That this jurisdiction encompassed the entire case is clear. He could have, for example, dismissed the entire case for want of a substantial federal question, *Ex Parte Poresky,* 290 U.S. 30 (1933); or issued injunctive relief on the grounds that the unconstitutionality of the statute was clear beyond doubt, *Bailey* v. *Patterson,* 369 U.S. 31 (1962); or he could have decided the pendent statutory claim favorably to Petitioners, *Swift & Co.* v. *Wickham,* 382 U.S. 111 (1965), thereby rendering resolution of the constitutional claim unnecessary. *Chicago, Duluth and Georgian Bay Transit Co.* v. *Nims,* 252 F. 2d 317 (6th Cir. 1958) (Stewart, J., then circuit Judge), cited with approval in *Idlewild Bon Voyage Liquor Corp.* v. *Epstein,* 370 U.S. 713, 715 n. 3 (1962); *Ex Parte Hobbs,* 280 U.S. 168 (1929). Cf., *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144 (1963). Some of these rulings might well have been erroneous, but the error does not inhere in an absence of jurisdiction in the district court under §1343(3).

The single-judge district court did none of these things, but rather, in the exercise of jurisdiction over the entire case, issued a temporary restraining order against Respondent and, acting on Respondent's urging, promptly requested the Chief Judge of the Second Circuit to convene a three-judge district court pursuant to 28 U.S.C. §2284.

When the three-judge tribunal was convened, the source of its power to adjudicate this case stemmed from the

district court's jurisdiction under 28 U.S.C. §1343(3). 28 U.S.C. §2284 assuredly does not confer general jurisdiction upon courts or judges over claims or cases falling within its terms. Assuming the non-applicability for some reason of §1343 (and the other jurisdiction-conferring provisions) to a case falling within §§2281 and 2284, a properly convened three-judge court would have no more power to decide the case than a single-judge court. Section 2284 in a word constitutes a procedural mechanism that removes a bar to the issuance of a particular form of relief that is imposed by 28 U.S.C. §2281 upon a single judge in a case over which the court, pursuant to some other provision, has jurisdiction. Whether that §2281 bar, where improperly invoked or disregarded, is properly denominated as "jurisdictional" in light of the consequences that ensue on appeal in this Court or the Circuit Court is of no relevance. 28 U.S.C. §§1253, 1291. See, e.g., *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144, 153 (1963) (dictum); *Borden Co.* v. *Liddy,* 309 F. 2d 871 (8th Cir. 1962).

What is of relevance is that the function of 28 U.S.C. §2284 is to enable the issuance of injunctive relief, otherwise barred by §2281, against state statutes that are unconstitutional, and unconstitutional in a special sense, *Swift & Co.* v. *Wickham, supra.* That is the burden of the statutory language in these provisions, and §2284 is to be seen "not as a measure of broad social policy to be construed with great liberality," but as "an enactment technical in the strict sense of the term and to be applied as such." *Phillips* v. *United States,* 312 U.S. 246, 251 (1941); *Swift & Co.* v. *Wickham, supra.*

The convening of the three-judge tribunal was of no more significance in respect to federal power over these

claims than would review of these claims by a tribunal improperly constituted under 28 U.S.C. §47, barring a trial judge from sitting on the appeal. For the same reason, dissolution of the three-judge court is of no significance to the power of the district court over the case under §1343. The case was not dismissed by that dissolution. Rather a claim over which the district court concededly had pendent jurisdiction was left for further proceedings. That claim was properly before the single district judge both pursuant to the terms of the remand and because he was the judge initially assigned to it. It called for relief that a single judge was not barred from granting. *Swift & Co.* v. *Wickham, supra.*

What is at issue herein thus is the exercise of the *power* of the district court over the pendent claim, not the wisdom of the three-judge tribunal's decision to dissolve. On that latter question, however, nothing in the language of 28 U.S.C. §2284 demands that a three-judge court must resolve each and every claim in a case properly before it. That statute is designed to enable a particular form of relief, and, as this Court has observed:

> "The three-judge court procedure is an extraordinary one, imposing a heavy burden on federal courts, with attendant expense and delay. That procedure, designed for a specific class of cases, sharply defined, should not be lightly extended." *Oklahoma Gas & Elec. Co.* v. *Oklahoma Packing Co.,* 292 U.S. 386, 391 (1934).

That the three-judge court, because it is a district court, has the power to fully decide the case before it, *Florida Lime & Avocado Growers, Inc.* v. *Jacobsen,* 362 U.S. 73 (1960), does not require the exercise of such power. Thus at least three reported lower court decisions have found

some questions in cases falling within §2284 best left to the initial district judge. *Landrey* v. *Daley*, 288 F. Supp. 194 (N.D. Ill. 1968) (three-judge, returning issues to a single judge); *Chester* v. *Kinnamon*, 276 F. Supp. 717 (D. Md. 1967); *Hobson* v. *Hansen*, 256 F. Supp. 18 (1966) (Order of Bazelon, C.J.). Cf., *Chicago, Duluth and Georgian Bay Transit Co.* v. *Nims*, 252 F. 2d 317 (6th Cir. 1958).

In this case, after the determination of mootness, the relief requested no longer required a three-judge court.[114]

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[114] Because the equal protection claim was founded on identity or similarity of living costs in the metropolitan counties outside New York City and the City, considerable question existed at the outset over whether that claim constituted the state-wide attack necessary for the convening of a three-judge court, *Moody* v. *Flowers*, 387 U.S. 97 (1967); *Griffin* v. *County School Board*, 377 U.S. 218 (1964). See also *Rorick* v. *Board of Comm'rs of Everglade Drainage Dist.*, 307 U.S. 208, 212 (1939). To avoid this complexity in the interest of obtaining a prompt ruling on the potentially dispositive statutory claim, Petitioners did not initially seek a preliminary injunction on the equal protection claim and opposed New York's motion to convene a three-judge court (260-271; Tr. 104-125), cf. *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 154 (1963). Though the single district judge recognized some discretion in convening a three-judge court in the circumstances (75), such a court was convened as the appropriate vehicle for speedy resolution of the case, with the decision of the three-judge court also representing the decision of the single-judge district court for purposes of appellate review (262-264; Tr. 108-111), *Mengelkoch* v. *Industrial Welfare Comm.*, 393 U.S. 83 (1968); *Rosado* v. *Wyman*, —— U.S. ——, 88 S. Ct. 2134 (1969).

In light of the scope of the constitutional attack and the prayer for declaratory relief, it may be that the initial convening of the three-judge court was neither necessary nor appropriate. Were this Court to find, contrary to our argument, that dissolution bears an implication for the power of the district court upon remand, we then ask this Court to deal with the above threshold question, since the dissolution becomes completely academic if a three-judge court was not initially required. Our argument on this question is set forth more fully in the Joint Appendix (260-271; Tr. 104-125). See also note 117, *infra*.

Swift & Co. v. *Wickham, supra.* There was no longer the possibility stressed in *Florida Lime & Avocado Growers, supra,* and *Brotherhood of Locomotive Engineers* v. *Chicago, R.I. & P. Ry.*, 382 U.S. 423 (1966), in support of the exercise of power by a three-judge court over the case, of a single judge entering the relief specifically barred by §2281.[115] Nor was there the alternative possibility of a three-judge court needlessly passing on a constitutional claim when a statutory ground would dispose of the case, cf. *King* v. *Smith,* 392 U.S. 309 (1968).[116] Even if the "political" aspects of this case were thought to indicate three-judge treatment, in that it was, fortuitously, possible, countervailing interests must be considered. Prompt disposition was of the utmost urgency, both because of the July 1 implementation date and to permit either party an effective opportunity of appellate review before July 1. The proofs on the statutory issue were substantial and the statute, then unconstrued, required a careful search of the legislative record. Judge Weinstein had been immersed in these tasks on a nearly full-time basis for several days and was familiar with the submissions from the outset. Indeed, his extraordinary efforts to demonstrate that courts can respond quickly to problems requiring speed deserve special tribute. Surely if the three judges, one from the Circuit Court, had not only to examine closely

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[115] As this Court stated in *Florida Lime Growers, supra,* in upholding the power of a three-judge court over a statutory claim:

> "To hold to the contrary would be to permit *one* federal district court judge to enjoin the enforcement of a state statute on the *ground of federal unconstitutionality* whenever a non-constitutional ground of attack was also alleged." 362 U.S. at 80. (Emphasis added.)

[116] This situation would certainly argue against reference of some non-constitutional claims to a single district judge.

these materials, but also to circulate opinions and agree upon resolution, the July 1 deadline and the desired opportunity for appellate review might well have not been met. This urgent need for rapid disposition, in our view, more than counterbalances any "political" advantages, assuming these are at all relevant, thought to flow from a three-judge ruling. Indeed, Respondent objected neither to the dissolution and remand nor to Judge Weinstein's prompt exercise of pendent jurisdiction.[117]

2. Under the Standards Set Forth in *Gibbs*, Exercise of Pendent Jurisdiction Was Compelled.

Judge Weinstein had jurisdiction, that is power, to decide the pendent federal claim. We turn to the question whether exercise of that power can possibly be deemed an abuse of discretion.

It is well settled that exercise of pendent jurisdiction is a matter of discretion. Note, The Evolution and Scope of

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[117] Hence, we do not add to the multitude of issues already before this Court the correctness of the ruling on mootness, since relief has now been granted on that claim in a subsequent case, *Rothstein* v. *Wyman*, —— F. Supp. ——, 69 Civ. 2763 (S.D.N.Y. 1969) (preliminary injunction entered October 22, 1969) and, as we shall see, the ruling does not bear upon the discretionary exercise of jurisdiction in the district court. Assuredly, all issues in the case, including the merits, are before this Court on the unlimited grant of the writ of certiorari to the Court of Appeals, where, after this Court's dismissal of the three-judge court appeal, all appeals were consolidated. The merits have been fully explored in the district court and the Court of Appeals, and they are before this Court either as an aspect of the three-judge or one-judge proceedings in the district court and the review in the Court of Appeals. This is not a case where this Court is without benefit of adequate confrontation and rulings on the merits below. *E.g.*, *Florida Lime & Avocado Growers* v. *Jacobsen*, 362 U.S. 73 (1960). Were this Court to find that relief should have been entered by the three-judge court, it may, of course, direct the remand to that court for the entry of the proper decree.

the Doctrine of Pendent Jurisdiction in the Federal Courts, 62 *Colum. L. Rev.* 1018, 1045 (1962). *United Mine Workers* v. *Gibbs, supra,* reiterates that point: The doctrine's "justification lies in considerations of judicial economy, convenience and fairness to litigants," 383 U.S. at 726, and these generally provide the controlling principles for the exercise of discretion. As we shall see, all of these factors, and some others, compelled the exercise of jurisdiction in this case. But before turning to these factors, it must be emphasized that the principles of limitation on the exercise of pendent jurisdiction set forth in *Gibbs,* and all previous cases we know of, are formulated in reference to pendent state law claims. Rather strict ones are warranted because "needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law," 383 U.S. at 726. See also Wechsler, Federal Jurisdiction and the Revision of the Judicial Code, 13 *Law and Contemp. Probs.* 216, 233 (1948). State laws reflect state policies, and federal courts should respect the state interest in effectuation of those policies unless they are invalid under the Constitution or Acts of Congress. Clearly, state policy is undermined as effectively by erroneous interpretation of state laws as by application of a general "federal" common law. *Erie R.R. Co.* v. *Tompkins,* 304 U.S. 64, 79 (1938). *Cf. San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236 (1959).

These considerations are foreign to the exercise of jurisdiction over a federal cause of action. Let it not be mistaken that the pendent claim here requires only an interpretation and application of federal law. That Respondent opposes our view of controlling federal law, or that he

defends the validity of a state law, the meaning of which is not uncertain, does not transmogrify this into a "state" law case. The only dispute in this case is over the meaning and effect of a federal statute. Federal courts are certainly the appropriate forum for resolution of such federal questions, for, "a surer-footed reading of applicable law," as indeed this Court observed in *Gibbs* in deeming it relevant to the exercise of jurisdiction over a state law claim that the claim may be related to federal "policies." 383 U.S. at 726. Where, as here, the pendent claim for relief is wholly federal (as federal as the jurisdiction-conferring equal protection claim) the only considerations relevant to the assertion of jurisdiction at any stage of the proceedings are whether the pendent claim involves the sort of minor controversy that Congress intended to bar from the federal courts through the use of jurisdictional amounts, or whether a merely frivolous jurisdiction-conferring claim is asserted. It should be obvious that neither of these limitations obtain here. The constitutional claim was more than colorable; it was concededly substantial (indeed meritorious in the view of a unanimous three-judge court)[118] and it affected the welfare of thousands of needy children. The pendent statutory claim is, in everyone's view, including Respondent's, anything but trivial. In these circumstances the same notions of comity, and justice between the parties, that invite reference of state law claims to the state courts compel resolution of a federal claim in a federal court. Indeed, burdening state courts with substantial and far-reaching federal claims over which there is concededly federal power itself raises questions of comity. That course has nothing to recommend it, save that it

[118] *Rothstein* v. *Wyman*, *supra*.

may be of tactical (and unfair) advantage to one of the parties.

We now show that under the standards established in *Gibbs,* albeit for considerations not pertinent here, the District Court's exercise of discretion was both appropriate and compelled. At the time of remand, a substantial commitment of federal judicial resources had already been made to the case. Five separate district court hearings were held at which extensive affidavits, exhibits and testimony were presented, including that of state and city officials. Seven memoranda, opinions, and orders of the district court were issued prior to the remand. These hearings and judicial opinions involved proofs and rulings on both the constitutional and statutory claims.[119] Sufficient showing had been made to justify the issuance on both claims of a restraining order, which was not disturbed by the three-judge court. In addition, substantial statistical material and charts were prepared and submitted by the parties and by the New York City Department of Social Services under subpoena, and were analyzed by the Court. In short, virtually a full trial had already been had in a case where summary judgment based on the record was destined to be dispositive. *Cf. United Mine Workers* v. *Gibbs,* 383 U.S. 715, 726 (1966); Note, The Evolution and Scope of the Doctrine of Pendent Jurisdiction in the Federal Courts, 62 *Colum. L. Rev.* 1018 (1962). Judge Weinstein required no further hearings or testimony prior to issuing his preliminary injunction opinion on May 15, three days after the case was remanded to him. His sixty-four

[119] At the time of the summary judgment proceeding before the three-judge court, Judge Moore noted that the legal memoranda and briefs on all issues added up to "6 and 7-eighths inches." Tr. 4; Doc. No. 41.

page opinion was based on the record developed *prior* to the dissolution of the three-judge court. Summary judgment motions were continued only to allow clarification of the precise magnitude of the public assistance cutback. Indeed, Respondent admitted in his application to the Court of Appeals for a stay of the summary judgment proceedings that "every real issue in the case has been decided by the District Court and is presently before this Court" [120] (242).

Critical also to the exercise of discretion was the need, agreed upon from the outset, for resolution of the validity of §131-a before July 1, 1969. As found in the order entered April 24, 1969, "all parties agree that time is of the essence . . . [D]elay would be costly to all concerned" (75). Dismissal in mid-May doubtlessly would have prevented any adjudication of validity before July 1, 1969. Adjudication after July 1 would have been both expensive and harmful to all parties concerned. "Both sides have indicated that prejudice will result should §131-a be declared invalid after administrative action has been taken" (75). There were also, at a minimum, substantial questions of independent basis for jurisdiction heretofore undecided by this Court. The presence of these questions, which, if we are right, leave no discretion to the district court, also argued for adjudication on the merits, with a view toward ultimate disposition of the case after one review in this Court.

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[120] In view of these developments, Chief Judge Lumbard's statement that

> "the constitutional claim had been dismissed well before a decision on the merits, and thus there had not been a substantial investment of federal judicial resources in the case as a whole at the time of the reference of the pendent claim to the single judge" (233)

is plainly inaccurate.

It is significant in this regard that Respondent did not after remand request Judge Weinstein to decline further jurisdiction, or indeed object to the remand from the three-judge court.

Under these circumstances, as Judge Feinberg noted in dissent below, the matter "begged" for the prompt decision of the federal court (236).

3. The Reasons Given Below Are Neither an Appropriate Nor Sufficient Basis for Finding an Abuse of Discretion in the Exercise of Pendent Jurisdiction.

Two reasons were given below to outweigh these compelling factors pressing for exercise of jurisdiction. In Judge Hays' words "the practical effect of an injunction is to order the state legislature to appropriate more funds for welfare" (222). Secondly,

> "H.E.W., with its acknowledged expertise in the field of social security, is far better equipped than the federal courts to review an alleged inconsistency between a complex state statutory scheme for payments in behalf of dependent children and an ambiguous amendment to the Social Security Act. The district court, even if it had power to act on the pendent claim, should have declined to do so, at least until H.E.W. had completed its consideration of the matter" (223).

The first reason says the case is "almost" non-justiciable; the second says it is "almost" unripe. Both views are, we believe, clearly erroneous under this Court's decisions. But neither reason is relevant to the exercise of discretionary jurisdiction. The case should still be decided, one way or the other.

The discretionary refusal to exercise pendent jurisdiction, as we have pointed out, serves primarily to protect the competency of state courts to expound state law. *United Mine Workers* v. *Gibbs, supra.* In the context of pendent federal claims, a comparable rule might serve to protect federal courts against adjudication of trivial lawsuits. The obvious fact in either case is that suit may be brought in state court seeking exactly the same relief. The basis of the suit in state court will once again be federal law, which the state courts must enforce. *Testa* v. *Katt,* 330 U.S. 386 (1947). Their decisions on matters of federal law are ultimately reviewable in this Court. 28 U.S.C. §1257. Certainly the state courts may not discriminate against this federal claim, declining to decide it by saying it is almost nonjusticiable, or almost unripe. They must decide it. The case will not go away. It merely becomes, at great expense to the parties, the burden of the state courts—courts which are not the preferred tribunals to decide substantial issues of federal law. The majority below thus misuses the limitations on pendent jurisdiction, limitations designed to allocate decision-making competence within the federal-state judicial system, by making them the basis of a refusal to confront and decide issues of justiciability and ripeness.

Petitioners further submit that under this Court's holdings in *Damico* v. *California,* 389 U.S. 416 (1967) and *King* v. *Smith,* 392 U.S. 309 (1968), no substantial doubt whatever exists that this case is justiciable and ripe. If Petitioners' view of §402(a)(23) is correct, the district court correctly issued the relief sought herein, relief that is in no way extraordinary. Moreover, that relief must issue without regard to the "pendency" of interminable negotiations between H.E.W. and the State to which these litigants are not

and may not become parties. We deal first with the problem of relief.

a. Petitioners are not presenting any constitutionally based argument that there is a right to welfare; or that New York must adequately provide for them.[121] Rather they seek enforcement of congressional mandates requiring that states which accept the hundreds of millions of dollars of federal monies made available under AFDC must carry out national program objectives. Whatever the limits of Congress's power to utilize the federal courts to impose directly obligations upon the states, *cf. Maryland* v. *Wirtz,* 392 U.S. 183 (1968); "there is of course no question that the Federal Government, unless barred by some controlling constitutional prohibition, may impose the terms and conditions upon which its money allotments to the States shall be disbursed, and that any state law or regulation inconsistent with such federal terms and conditions is to that extent invalid." *King* v. *Smith,* 392 U.S. 309, 333 n. 34 (1968); see also *Ivanhoe Irrigation District* v. *McCracken,* 357 U.S. 275, 295 (1958); *Oklahoma* v. *Civil Service Commission,* 330 U.S. 127, 143 (1947).

King v. *Smith, supra,* likewise makes clear the procedural mechanisms by which state compliance with the Social Security Act may be obtained by injured recipients. State officials can be sued to restrain them from implementing invalid state laws without raising Eleventh Amendment problems. Thus, in *King* this Court affirmed a lower court decree restraining state officials from implementing state legislation in conflict with plan condition 9, now 10, 42 U.S.C. §602(a)(10). All this, we believe, should be basic.

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[121] *Cf.* A. Berle, The Three Faces of Power, at 9 n. 6 (1967).

It says nothing more than that welfare litigants, like all other petitioners in federal courts, are entitled to application of the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908) and its progeny; *e.g.*, *Home Telephone & Telegraph Co.* v. *City of Los Angeles*, 227 U.S. 278 (1913); *Georgia R.R. & Banking Co.* v. *Redwine*, 342 U.S. 299 (1952). Actions restraining state officials from enforcing invalid state laws are not against the state and are not barred by sovereign immunity. While *Ex Parte Young* itself may be based on a fiction, the doctrine is "indispensable to the establishment of constitutional government and the rule of law." [122]

The difference between this case and *King* v. *Smith*, *supra*, is that petitioners here seek compliance with plan condition 23; while in *King* enforcement of plan condition 9 was sought. Judge Hays and Chief Judge Lumbard, however, saw a compelling difference in that *King* v. *Smith* specifically mentions that Alabama can continue participation in the AFDC program without necessarily spending more money on welfare programs. For several reasons, petitioners submit that there is no compulsion whatever in this difference. First, the Court's statements in *King* were not addressed to the propriety of issuing the injunctive relief sought, but were merely to note that the flexibility generally afforded the States by Congress in the Social Security Act was not contravened by the Court's interpretation of the statute. Alabama's authority to adjust benefits was adverted to as an instance of that flexibility. But flexibility as to the amount of resources a state devotes to public assistance survives here as well. The Act leaves the States free to determine the amount of allowable re-

[122] C. Wright, Handbook of the Law of Federal Courts 161 (1963).

sources for recipients, the financial obligation of responsible relatives, the use of liens and assignments of property, and the breadth of the obligation to repay. 42 U.S.C. §602 (b). Under AFDC states may or may not provide aid to children over 18, or to children in foster homes or homes with an unemployed parent. 42 U.S.C. §§606(a), 607(b), 608(d). States may also eliminate an array of optional services they provide for AFDC families, 42 U.S.C. §§602 (a)(13), (14) and (15), determine the extent of local financial participation, 42 U.S.C., §602(a)(2), and may eliminate extraordinary administrative expenses through use of a declaration system for determining and redetermining eligibility, as H.E.W. recommends.[123] They may also reduce expenditures in the other federally financed programs. To be sure, these may not be desirable alternatives, any more than an overall cutback after *King* v. *Smith, supra,* or *Shapiro* v. *Thompson,* 394 U.S. 618 (1969) was desirable. See also *Williams* v. *Dandridge,* 297 F. Supp. 450 (D. Md. 1969), *prob. juris. noted,* 38 U.S.L.W. 3127 (Oct. 13, 1969). Indeed the States did not rush to slash benefit levels upon the impact of compliance with constitutional or statutory mandates on eligibility. New York may well decide that maintenance of previous efforts is the more appropriate response. But continuation of previous expenditures is but one of the alternatives open to New York under the relief sought in this case.[124]

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[123] See 45 C.F.R. §205.20 (Jan. 17, 1969).

[124] See generally, The Advisory Commission on Intergovernmental Relations, Statutory and Administrative Controls Associated with Federal Grants for Public Assistance (May, 1964). As that report notes:

> "Perhaps the area of greatest flexibility allowed the States in administering the public assistance programs is in the determination of eligibility requirements for recipients." *Id.* at 30.

(footnote continued on following page)

Equally important, the state is not by the terms of the decree required to spend any money at all. All that is sought is an order barring implementation and enforcement of invalid state law. No expenditures whatever are thereby required. The state may save a great deal of money by deciding simply to withdraw from the AFDC program. Its officers will not then be violating federal law.[125] This response by the State is improbable but not for reasons related to the terms of the relief requested. Federal courts have frequently issued restraining decrees where the likely effect is to compel state legislative action. See *e.g.*, *Westberry* v. *Sanders*, 376 U.S. 1 (1964); *Reynolds* v. *Sims*, 377 U.S. 533 (1964) and their progeny. Cf. *Griffin* v. *Illinois*, 351 U.S. 12 (1956); *Douglas* v. *California*, 372 U.S. 353 (1963).[126] So long as the state's action is not

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After setting forth the array of state statutory and administrative provisions, aside from grant levels, that have an impact on the public assistance programs and the size of recipient rolls, the Commission concluded:

> "The point of all this is that States do have a great deal of leeway in shaping their public assistance programs. The data presented above should dispel some of the commonly held beliefs that the Federal Government exercises such a heavy control over public assistance programs as to substantially eliminate policy discretion at the State level . . . [i]t should be emphasized that the presence or absence of the types of State requirements described above have an obvious effect upon State and Federal costs for public assistance." *Id.* at 59.

[125] To be sure, some responses by the State to an injunction against its officials are more favorable to Petitioners than others. In this respect, the situation is comparable to equal protection cases where the plaintiff who wins may merely succeed in drawing everyone else down to his level rather than improving his own position.

[126] Indeed, federal power to direct state or federal officials to conduct a state election on a state-wide basis would seem a far more difficult Eleventh Amendment problem than any question of relief presented here.

decreed but is a response to the Court's action, chosen in preference to the state of affairs which would exist without such a response, no problem of federal power arises.

In any event, it is doubtful that any absolute bar exists to compelling state officials to spend money. For example, this Court, in *Griffin* v. *County School Board*, 377 U.S. 218 (1964), issued an order directing defendants, one of whom was the State Superintendent of Education, to reopen the schools and if necessary to raise taxes to do so. Similarly, that state legislative officers might have to be ordered to seat an invalidly excluded state representative did not bar this Court in *Bond* v. *Floyd*, 385 U.S. 116 (1966) from issuing declaratory relief. Indeed, in one of the early landmarks of our federalism, *Osborne* v. *Bank of United States*, 22 U.S. (9 Wheat.) 738 (1824), this Court, in an opinion written by Chief Justice Marshall, ordered repayment of improperly exacted state taxes. These questions are subtle no doubt, and they need not be pursued here. This case clearly falls within the general rule. They serve to point up, however, that even where the conflict is squarely posed there are no absolutes in this area. Each such issue must be evaluated in terms of the nature of federal interference, and the nature of state interest infringed upon. Cf. *Maryland* v. *Wirtz*, 392 U.S. 183 (1968); *Parden* v. *Terminal Railway*, 377 U.S. 184 (1964).

b. The second reason for holding Judge Weinstein's exercise of pendent jurisdiction an abuse of discretion—that the Department of Health, Education and Welfare "is far better equipped than the federal courts to review an alleged inconsistency between" the state and federal statutes—directly conflicts with this Court's holdings in *Damico* v. *California*, 389 U.S. 416 (1967), *King* v. *Smith*,

392 U.S. 309 (1968), and its recent summary affirmance in *Shapiro* v. *Solman*, 38 U.S.L.W. 3125 (October 13, 1969). In all three cases, this Court did not require a litigant to await H.E.W. action before suing on a Social Security Act claim in federal court. In a word, no such delays are proper where the recipient has no right whatever to initiate an H.E.W. proceeding or to be a party to any proceeding that H.E.W. might initiate.

We first develop that the issue in this case is in exactly the same procedural posture vis-a-vis H.E.W. as was the issue in *King;* we then demonstrate that the reasons underlying this Court's holdings in *Damico, King* and *Shapiro* are sound.

States desiring to take advantage of the substantial federal funds made available under AFDC are required to submit a plan to the Secretary of Health, Education and Welfare for his approval. 42 U.S.C. §§601-604. The plan must conform with federal statutory requirements (such as 402(a)(23)) and with regulations promulgated by H.E.W., 42 U.S.C. §602. Unless H.E.W. approves the initial plan, federal funds are not supposed to be released to the states for its implementation. 42 U.S.C. §601. Once initially approved, federal funds are provided until a change is formally disapproved. 42 U.S.C. §604(a). As was the case in *King* v. *Smith* with regard to Alabama's substitute father regulation, H.E.W. has never approved or disapproved New York's welfare cuts. Although this suit was initiated prior to the operative date of §131-a, it is now seven months since that statute became a part of New York's AFDC plan, and four months since it was implemented by Respondent, and H.E.W. has still neither approved nor disapproved this major change. Rather, H.E.W. has informed New York,

in early April, that "questions" exist whether §131-a complies with the Social Security Act (and it clearly does not even on H.E.W.'s reading of §402(a)(23), 45 C.F.R. §233.20 (a)(2)(ii)). H.E.W. requested New York to supply the agency with information showing that "the State has a need standard in effect . . . which has been adjusted since January 2, 1968 to reflect fully changes in living costs."[127] To date, New York has not provided this information except to send H.E.W. the implementing regulations for §131-a. Nonetheless, the cuts are part of New York's AFDC plan and federal funds are still being made available to New York.

It is against this background of informal negotiating procedures that the reliance below on a "study" being made by H.E.W. and on "review proceedings" initiated by H.E.W. must be assessed. No proceeding whatever in the formal sense had or has been commenced. H.E.W. was doing no more and no less in this case than it was doing in *King* v. *Smith*.[128] H.E.W. stands ready to negotiate with the State once the State, in its own time, provides the necessary information. The time period over which those negotiations will proceed is entirely indefinite.

To be sure, H.E.W. does have the power to cut off, entirely or partially, federal payments if "in the administra-

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[127] Letter of James Callison to George K. Wyman, April 16, 1969 (108).

[128] Chief Judge Lumbard's effort to avoid this Court's holding in *King* on the ground that "H.E.W. had already given notice to the state that its regulation did not conform" treats rather lightly this Court's explicit observation in *King* that "Alabama's substitute father regulation has been neither approved nor disapproved by H.E.W." 392 U.S. 309, 317, n. 11. Precisely the same is true herein; H.E.W. has neither approved nor disapproved §131-a.

tion of the plan there is a failure to comply substantially with any provision required by §602(a) of this title to be included in the plan." 42 U.S.C. §604. This can be done forthwith or after the State or H.E.W. initiates a "conformity hearing," to which the State and H.E.W., and only they, are parties. 42 U.S.C. §604(a). The State has a right of review after an adverse decision. 42 U.S.C. §1316. This power is virtually never used by H.E.W. As Secretary Finch informed petitioners, hearings on conformity of State laws are held "only on the initiative of [H.E.W.] as a last resort." [129] Thus, to our knowledge, only two final determinations of nonconformity of State AFDC plans have been made since 1935. Altmeyer, The Formative Years of Social Security (1968), at 75.

The reasons for H.E.W.'s reluctance to invoke its ultimate power are not far to seek. H.E.W.'s role vis-a-vis the states is primarily cooperative, assisting the states in drafting legislation and regulations—the great body of which poses no issue of state intent to defeat the objectives of federal law—which comply with the complex formal requirements created by Congress.[130] H.E.W. guides the

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[129] Letter of Robert H. Finch to Richard J. Flaster (131).

[130] As summarized in the Report of the Advisory Commission on Intergovernmental Relations, *op. cit.*:

"Through such devices as the administrative review, routine financial and statistical reports, planned consultations by regional personnel with State personnel, as well as through other formal and informal means, the Federal agency keeps informed as to whether a State plan complies—on paper and in actual operation—with the Federal act . . . It should be noted that as a practical matter Federal professional personnel, especially those in the regions, and State professional personnel work together very closely, and that they are usually rather well-informed of the others' intentions and actions. Consequently, it is not often that a new State action or a Fed-

states in creating cost-saving administrative mechanisms, cost saving for the federal government as much as for the states. Generally these are not mandatory on the states. Plainly the goal of achieving state cooperation in these efforts will be undercut by threats of immediate cut-off. Finally, and most importantly, the political difficulties involved in obtaining compliance by cutting off funds are obvious and overwhelming. While the theoretical difference may seem slight, there is enormous practical difference between a court's ordering compliance, leaving it to the state to drop out of AFDC if it so chooses, and an order directing that AFDC funds cease forthwith.[131] This difference is exacerbated where, as here, the state administrator, with whom H.E.W. negotiates, is without power under state law to comply with any H.E.W. directive. For these reasons, commentators,[132] and H.E.W. itself, have recognized that their formal power to terminate funds is not a viable remedy to control state refusal to comply with federal conditions. Indeed H.E.W. itself has sought relief in the federal courts, rather than invoking its own ultimate power to terminate funds. *United States* v. *Frazer,* 297 F. Supp. 319 (M.D. Ala., 1968).

The question, then, is whether these administrative relationships between H.E.W. and the states serve to bar a

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eral requirement arises totally unexpectedly." The Advisory Commission on Intergovernmental Relations, Statutory and Administrative Controls Associated with Federal Grants for Public Assistance, 62 (1964).

[131] The difference lies not in the source of relief, court as against agency, for even if H.E.W. orders cut-off of funds that order may be taken to court, but rather that, in one case, the State must affirmatively choose to get out of the program. Affirmative action is hard to obtain, and the counsel of cooler heads is likely to prevail.

[132] Note, Federal Judicial Review of State Welfare Practices, 67 Colum. L. Rev. 84 (1967).

litigant from asserting his rights under federal law in court. The answer that this Court has three times given,[133] and the only answer consistent with general principles of administrative law, is no. In *Damico, King,* and *Shapiro* v. *Solman* relief was granted immediately with no recourse to H.E.W., both because this suit is maintained under 42 U.S.C. §1983, where administrative exhaustion is not required, *McNeese* v. *Board of Education,* 373 U.S. 668 (1963), and because there is nothing to exhaust. This issue is whether these cases are to be overruled. We think not. Nor is this an answer that need be grudgingly given, a consequence of congressional oversight. H.E.W. *amicus* participation in federal court litigation provides a sound basis for ensuring immediate vindication of crucial rights without loss of administrative expertise.

Two functionally interrelated doctrines of administrative law—exhaustion of remedies, and primary jurisdiction—serve to bar litigants in some situations from the federal courts. The court below did not say whether it was applying one or the other or some combination of the two. Both serve not as absolute bars to relief but rather to govern the timing of judicial action. See L. Jaffe, Judicial Control of Administrative Action, 425 (1965). Generally the exhaustion requirement applies when a litigant seeks relief from administrative action claimed to be harmful—not the case here in regard to H.E.W. The doctrine's major function

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[133] *Shapiro* v. *Solman,* 38 U.S.L.W. 3125 (October 13, 1969), *aff'g* 300 F. Supp. 409 (D. Conn. 1969) (three-judge); *King* v. *Smith,* 392 U.S. 309 (1968); *Damico* v. *California,* 389 U.S. 416 (1967). Prior to *Rosado,* other courts understood this mandate clearly, *e.g., Solman* v. *Shapiro, supra; Williams* v. *Dandridge, supra; Lampton* v. *Bonin, supra; Jefferson* v. *Hackney, supra.* The Second Circuit has now set out on its own course. *Rothstein* v. *Wyman, supra.* The general problem is explored in Note, Federal Judicial Review of State Welfare Practices, 67 Colum. L. Rev. 84 (1967).

is to ensure administrative finality prior to judicial intervention. Thus, a litigant may not bypass the administrative forum Congress has established for resolution of an issue by claiming that to proceed therein will cause irreparable damage. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938).[134] Precluding resort to the courts preserves the integrity of the administrative process Congress has established.

The doctrine of primary jurisdiction, on the other hand, applies where competency on certain issues has been delegated by Congress to an agency, generally those agencies in the day-to-day business of regulating in comprehensive fashion key industries pursuant to broad congressional delegations, *e.g.*, *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U.S. 285 (1922). See generally K. Davis, Administrative Law §19.01 (1965). In such a case, courts should postpone action until the agency has acted on these issues. *Gen. American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U.S. 422 (1940). The agency determination will lay a sound basis for judicial review. While there is an obvious similarity in purposes to those served by the exhaustion doctrine in that both look to informed judicial review, a difference is that in primary jurisdiction cases the party seeking relief is typically not seeking it against the agency, but rather against another private party. Thus the usual focus of the exhaustion doctrine—the ripeness or finality of administrative action claimed to be harmful, *e.g.*, *Columbia Broadcasting System Inc.* v. *United States*, 316 U.S. 407 (1942), is lacking. Indeed, in primary juris-

[134] Nor may review be had piecemeal of each and every interlocutory order, *Federal Power Comm'n* v. *Metropolitan Edison Co.*, 304 U.S. 375 (1938).

diction cases the agency may not even be able to grant the full relief sought against the party. See *Far East Conference* v. *United States,* 342 U.S. 570 (1952); *Federal Maritime Board* v. *Isbrandtsen Co.,* 356 U.S. 481 (1958).

Neither doctrine is applicable here. Both presuppose the actual availability of administrative action. *Abbott Laboratories* v. *Gardner,* 387 U.S. 136 (1967); *Frozen Food Express* v. *United States,* 351 U.S. 40 (1956); *Columbia Broadcasting System* v. *United States,* 316 U.S. 407 (1942); see Jaffee, *op. cit. supra* at 424. The Court when invoking these doctrines says to the litigant in effect, you should not have come here, at least, not yet; you should go there. Obviously no such directive is appropriate where the litigant cannot and never could turn up at the agency door. Yet that is precisely the case under the Social Security Act. An AFDC recipient has no right whatever to any proceedings before H.E.W. on any issue whatever. H.E.W. has power to hold hearings to which it and the state are the only parties. The recipient cannot even require that a hearing so limited be held. H.E.W. will act only on its own initiation, and its taking action is not a realistic possibility for the reasons we have detailed. Informal agency-state negotiations may and usually do proceed indefinitely[135] and no regard is had for the interim harms inflicted on recipients, whose interests are, if anything, immediate. Indeed, even where H.E.W. did act, recipients were denied

[135] The Court noted in *King* v. *Smith* the progress that this informal negotiating process had made in the case of Alabama's suitable home and substitute father regulations. Initial correspondence between H.E.W. and the State of Alabama began in April 1959. Suit was brought by recipients on December 2, 1966 with a final decision by the Supreme Court on June 17, 1968. H.E.W. to that date had not formally approved or disapproved the regulation in question.

standing to intervene when review of the subsequent order was sought in court by a state. *Georgia* v. *Cohen,* Case No. 26042 (5th Cir. 1968), *dismissed* Sept. 12, 1969.

We know of not one single case in federal law where a litigant was barred from court on the basis of failure to exhaust remedies or invoke an agency with primary jurisdiction when in fact he does not have, and never had, any opportunity to appear before the administrative body and participate in the development of the record therein. To hold to the contrary is to rule that the matter is non-justiciable for now and likely evermore.[136]

The relationship of H.E.W. and the AFDC recipient may perhaps be atypical of the administrative process.[137] How-

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[136] That a constitutional claim was actually before the court in *King,* making the statutory ground a preferred basis for decision is clearly a difference of no substance. The appropriateness of awaiting agency determination of statutory problems cannot turn on the happenstance of related constitutional issues. Cf. *Myers* v. *Bethlehem Shipbuilding Corp., supra.* Thus after the Court of Appeals decision in *Rosado,* a three-judge court in the Second Circuit decided a claim on constitutional grounds, refusing to rule on alternative statutory grounds because H.E.W. "action" was pending. *Rothstein* v. *Wyman, supra.* This is a flat disregarding of *King.*

[137] Compare however, *Shepheard* v. *Godwin,* 280 F. Supp. 869 (E.D. Va. 1968) (3-judge court), a case which dealt with federal assistance to impacted school localities. The applicable statute in that case read:

> "The amount which a local educational agency in any State is otherwise entitled to receive . . . shall be reduced in the same proportion (if any) that the State has reduced for that year its aggregate expenditure (from non-federal sources) per pupil for current expenditure purposes for free public education (as determined pursuant to regulations of the Commissioner) below the level of such expenditures per pupil in the second proceeding fiscal year. The Commissioner may waive or reduce this reduction whenever in his judgment exceptional circumstances exist which would make its application inequitable and

ever, there is, in this setting, little purpose to be served by prior administrative recourse even were one available. First, the issues generally posed in welfare cases are whether specific congressional mandates are infringed by state laws and regulations. Usually there are few complicated factual issues of the sort that courts do not regularly deal with, and there is no problem of any agency developing a comprehensive scheme of industry regulation based upon broad congressional delegation of law-making power. Second, the basic value of judicial decision-making informed by administrative expertise, *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938), *Federal Maritime Board* v. *Isbrandtsen Co., supra,* is more than adequately served by H.E.W.'s participation as *amicus curiae* in welfare litigation where that is appropriate. H.E.W. has frequently so served.[188] Criticisms of too rigid application of the primary jurisdiction doctrine have noted, Jaffe, *op. cit. supra,* at 133, that agency assistance to the Court often may be more quickly and cheaply achieved by agency presentation to the Court than through separate administrative proceedings. At the heart of this controversy is the construction of a federal statute on which H.E.W. has amply expressed its views, which are a part of the record in this case.

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would defeat the purpose of this subchapter." 20 U.S.C. §240 (d).

The Court held that "the amendment provides only an administrative remedy of the Government and does not deprive the plaintiffs of standing to prevent future State infringement of their Constitutional right to the benefits of the aid purposed by Congress." 280 F. Supp. at 875.

[188] *Kelly* v. *Wyman,* 294 F. Supp. 887 (S.D.N.Y. 1968), *prob. juris. noted sub nom. Goldberg* v. *Kelly,* 37 U.S.L.W. 3399 (April 21, 1969) and see its briefs in *Lampton* v. *Bonin* and *Jefferson* v. *Hackney* which are printed in the appendix. H.E.W. has never opposed the duty of a federal court to proceed in such case.

The consequences of a holding that judicial enforcement of rights held justiciable in *King* v. *Smith* must await the outcome of H.E.W.'s meandering negotiations cannot be too highly stressed. The claims of AFDC children are invariably of the greatest immediacy, as the issuance of temporary relief in these cases makes clear. The substantial and uncontroverted evidence in this case shows that the level of public assistance to needy families in New York, even prior to the enactment of §131-a, provided "for life on a level of sustenance, nothing more, and often less." [139] The District Court found, and the finding has not been disturbed, that "a reduction in welfare benefits . . . may threaten injuries to . . . children's physical and mental development far greater than the mere monetary loss in benefits." This recitation of Petitioners' economic and physical plight underlines the necessity for a speedy decision on the merits, a necessity to which Judge Weinstein responded admirably.

Judge Weinstein in no way abused his discretion by deciding this claim.

B. *Independent Jurisdiction of a Claim Properly Brought Under 42 U.S.C. §1983 Exists Under Both 28 U.S.C. §1343(3) and 1343(4).*

Although the District Judge had no need to reach these issues, Petitioners have from the start asserted §§1343(3) and 1343(4) as independent jurisdictional bases for the statutory claim, which is brought under 42 U.S.C. §1983. The Court of Appeals, erroneously we believe, held to the contrary. The issue is one of first impression in this Court. *King* v. *Smith,* 392 U.S. 309, 312 n. 3 (1968). Compare *McCall* v. *Shapiro,* —— F.2d ——, No. 33061 (2d Cir.

[139] Affidavit of Joseph Barbaro (Doc. No. 34).

August 11, 1969) with *Gomez* v. *Florida State Employment Serv.*, —— F.2d ——, No. 26719 (5th Cir. October 9, 1969).

Title 28 United States Code, Section 1343 provides:

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> • • • • •
>
> (3) To redress the deprivation, under color of any State law . . . of any right, privilege or immunity secured by . . . any Act of Congress providing for equal rights of citizens . . . ;
>
> (4) To . . . secure equitable or other relief under an Act of Congress providing for the protection of civil rights."

Subsection 1343(4) literally provides federal jurisdiction for any suit seeking equitable relief under the Civil Rights Act, 42 U.S.C. §1983. Jurisdiction also exists under §1343(3) since §1983 is an Act of Congress "providing for equal rights of citizens" within the purview of §1343 (3). Respondent, however, contends that §1343(4) must be read in light of its history and not its words; whereas the Respondent argues §1343(3) must be read in light of its words and not its history. Petitioners will be happy with consistent application of either approach.

42 U.S.C. §1983 is relevant to jurisdiction under both subsections. It provides:

> "Every person who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable . . . in [a] suit in equity, or other proper proceeding for redress."

The statutory claim herein is clearly authorized by this section. The petitioners seek to restrain state officials from depriving them of "rights, privileges or immunities" secured by federal "laws," namely the Social Security Act. While that Act creates no absolute right to welfare as against the State, it does create rights of a different sort, namely the statutory right to public assistance in accordance with the Act's commands, which are binding on the States. *King* v. *Smith*, 392 U.S. 309 (1968). That the protection of this sort of interest constitutes a "right, privilege or immunity" for purposes of §1983 is made clear by numerous equal protection and due process claims brought thereunder. See, e.g., *Damico* v. *California*, 389 U.S. 416 (1967) (public assistance), *Glicker* v. *Michigan Liquor Control Comm'n*, 160 F. 2d 96 (6th Cir. 1947) (revocation of a liquor license), cf. *Harmon* v. *Brucker*, 355 U.S. 579 (1958).[140]

Nor is this claim outside §1983 because it is based upon a "law" and not upon the Constitution. The "laws" provision was added by Congress in 1875, R.S. 1979, —— Stat. ——, for the obvious purpose of permitting federal actions whenever federal rights were threatened or infringed upon by state officials.[141] Although §1983 cases asserting rights solely on the basis of federal laws are rare, primarily because such laws either contain their own remedial provisions, *Schatte* v. *International Alliance of Theatrical Stage Employees*, 182 F. 2d 158 (9th Cir. 1950), or are in any event exempted from the amount in controversy requirement, see, *e.g.*, 28 U.S.C. §1337, that this

[140] See generally Note, Federal Judicial Review of State Welfare Practices, 67 Colum. L. Rev. 84, 110 (1967).

[141] Compare Civil Rights Act of 1871, ch. 22, §1, 17 Stat. 13.

is the rare case is besides the point. The statutory language says "laws", and reconstruction legislation is to be construed as meaning what it says. *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968). There is no basis, historical or appropriate, for selecting some "laws" as within §1983 and not others. As Judge Learned Hand said, in upholding §1983's coverage of suits to vindicate all federal statutory rights and privileges "the language [of 1983] is so plain that the only question is whether this particular "law" secured to the plaintiff a "privilege." *Bomar* v. *Keyes*, 162 F. 2d 136, 139 (2nd Cir. 1947); see also *Greenwood* v. *Peacock*, 384 U.S. 808, 829-30 (1966) (dictum); *Dyer* v. *Kazuhisa Abe*, 138 F. Supp. 220 (D. Hawaii 1956) (dictum); but *cf. Holt* v. *Indiana Manufacturing Co.*, 176 U.S. 68 (1900).

The refusal to pick and choose among "laws" for which §1983 creates an action is supported by this Court's refusal to limit, despite earlier hesitation, the "constitutional" rights protected by §1983 to cases dealing with racial discrimination. All constitutional rights are protected by §1983, notwithstanding Respondent's assertions[142] to the contrary. See, e.g., *Monroe* v. *Pape*, 365 U.S. 167, 180-183 (1961); *Baker* v. *Carr*, 369 U.S. 186, 200 and note 19 (1962); *Douglas* v. *City of Jeanette*, 319 U.S. 157, 161-2 (1943).

We turn then to the jurisdictional provisions. 28 U.S.C. §1343(4) provides that the district courts shall have orig-

[142] To the extent these assertions are based upon cases construing the federal removal statute, 28 U.S.C. §1443(2), they are clearly inapposite. The removal provision must be

> "distinguished from laws, of which the Due Process Clause and 42 U.S.C. §1983 are sufficient examples, that confer equal rights in the sense, vital to our way of life, of bestowing them upon all." *Georgia* v. *Rachel*, 384 U.S. 780, 792 (1966).

inal jurisdiction of any civil action "to secure equitable or other relief under any Act of Congress providing for the protection of civil rights." 42 U.S.C. §1983 is an Act "providing for the protection of civil rights." Commonly known as the Civil Rights Act, its title, as originally passed in 1871 was:

> "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes."

Civil Rights Act of 1871, ch. 221, §1, 17 Stat. 13.

The clear purpose of the statute was *protection* of civil rights. Consequently, any cause of action under §1983 is "under" an "Act of Congress providing for the protection of civil rights." 28 U.S.C. §1343(4) therefore provides federal jurisdiction.

But Respondent asks this Court to ignore the literal language of §1343(4) in light of the purpose of Congress (precisely the reverse of Respondent's very literal position on §1343(3)). Subsection (4) was added to §1343 as part of the Civil Rights Act of 1957. Pub. L. No. 85-315, §121, 71 Stat. 637. The legislative history as to this provision characterizes it as a "technical" amendment conforming the jurisdictional provisions to the substantive law. H.R. Rep. No. 291, 85th Cong., 1st Sess., 11 (1957). But in enacting §1343(4), Congress acted on the intent to insure that all of the cases under the various Civil Rights Acts have a federal forum. Congress in 1957 may well have assumed that all claims under §1983 already had a basis for jurisdiction under §1343(3). But using §1343(4) as such a basis would conform to the central congressional intent of insuring that there be no civil rights action without a federal forum. In one of the few cases relying di-

rectly upon §1343(4) and §1983 the court found jurisdiction to hear a claim against police officers who assaulted and photographed a woman. In relying on §1983 the court implicitly confirmed that section to be a civil rights act for purposes of 1343(4), even though the case involved no racial overtones. *York* v. *Story*, 324 F. 2d 450 (9th Cir. 1963), *cert. den.* 376 U.S. 939 (1964). See also *Gomez* v. *Florida State Employment Serv., supra.*

Section 1343(3) is also a basis of jurisdiction. Its language generally parallels that of §1983, the major difference being that while §1983 creates a cause of action for deprivation of any statutory right, §1343(3) confers jurisdiction where the rights are "secured" by an Act "providing for equal rights." Although the Court has never passed on the issue, the history of these provisions reveals beyond doubt that there was no intent to create a hiatus between the cause of action created by §1983 and the jurisdiction of the federal courts. Such a result would be absurd in that the very purpose of §1983 is to provide a federal *remedy* against state action illegal under federal law, *McNeese* v. *Board of Education*, 373 U.S. 668, 672 (1963). Thus, in *Bomar* v. *Keyes, supra,* Judge Hand simply assumed (or thought the point so obvious as to require no discussion), that §1343(3) provided a jurisdictional basis for any §1983 suit.

The origin of §1983 is Section 1 of the Civil Rights Act of 1871, ch. 22, 17 Stat. 13. That same section provided that any substantive action thereby created could be brought in the federal district and circuit courts in the same manner as provided under the Civil Rights Act of 1866, ch. 31, 14 Stat. 27. There was thus at the start a rather clear intent

to establish a right to bring any authorized Civil Rights Action against state officials in the federal courts.[143]

In 1875, as part of a full scale revision of the federal judicial statutes, the substantive provisions of 17 Stat. 13 became R.S. 1979, which was identical with the present 42 U.S.C. §1983. The jurisdictional provisions were found in two places. R.S. 563(12) provided for original jurisdiction in the district courts for any action brought to redress deprivation of rights secured by the Constitution or laws of the United States, which exactly tracks the language of §1983. R.S. 629(16) gave the circuit courts jurisdiction in actions to redress the deprivation of rights secured by the Constitution or by laws providing for equal rights. It seems clear that the intent of both clauses, despite the slight difference in language, was to ground jurisdiction for actions brought under R.S. 1979 and R.S. 1977 (the present 42 U.S.C. §§1983 and 1981, respectively). Both jurisdictional statutes are cross-referenced by the Revisors to R.S. 1977 and 1979. Contemporary judicial opinion while not considering the specific problem presented here, clearly recognized that R.S. 629(16), the circuit court provision, was merely the jurisdictional partner of R.S. 1979 (now §1983). *Carter* v. *Greenhow,* 114 U.S. 317 (1885) and *Pleasants* v. *Greenhow,* 114 U.S. 323 (1885).

These two jurisdictional statutes were consolidated and assumed their present form with the revision of the Judicial Code in 1910. Act of March 3, 1911, ch. 231, 36 Stat. 1087. The form of R.S. 629(16) was retained rather than that of R.S. 563(12). There is no explanation for the choice.

[143] This is the interpretation given the statute in H. Hart & H. Wechsler, Federal Courts and The Federal System at 729 (1953).

The scant legislative history supports the conclusion that Congress intended to provide jurisdiction for all actions authorized by §1983. "This paragraph merges the jurisdiction now vested in the district courts by paragraph 12 of section 563, and in the circuit courts by paragraph 16 of section 629, and vests it in the district courts." S. Rep. No. 388, 61st Cong., 2nd Sess. Pt. 1 at 15 (1910).

Thus throughout the long history of these statutes every indication is that the scope of the jurisdictional statute is as great as its substantive counterpart, §1983. That the change of 1910 took place amidst a general revision of the judiciary code suggests even more strongly that Congress did not intend to change the jurisdictional framework to create a gap between the substantive action and jurisdiction to hear it. Any such result would be anomalous indeed. A comprehensive federal remedy is created, part of which cannot be enforced in a federal court.

Nor is such an anomalous conclusion compelled. Section 1983 is itself a statute providing for equal rights, for it grants those who are oppressed by state action a specific remedy. As this Court noted in *Georgia* v. *Rachel,* 384 U.S. 780, 792 (1966), §1983 is a law that "confer[s] equal rights in the sense, vital to our way of life, of bestowing them upon all." It also serves to "secure" such rights. This Court has recently indicated in *Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409 (1968) that the Reconstruction civil rights statutes are to be given the full vigor intended by the Congress of that time even after 100 years of desuetude. Certainly, a revisor's technical change in language ought not substantially affect a statute which has remained a part of the Judicial Code throughout the last 97 years,

particularly where the congressional intent was to "vest" the prior jurisdiction in the district court.

A restrictive interpretation of §1343(3) combined with a restrictive interpretation of §1343(4), would create an anomalous category of cases where there is a substantial federal question and a federal cause of action, but no original federal court jurisdiction. This was at one time common, perhaps, but now the overwhelming majority of federal claims will ground jurisdiction in the federal courts regardless of amount in controversy,[144] including well-nigh every claim founded on a federal regulatory or administrative program.[145] Moreover, giving effect to the historic and functional inter-relationship of §1983 and §§1343(3) and (4) will not undercut the purposes of §1331 because the

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[144] The patchwork quilt of statutes from 28 U.S.C. §§1333 through 1361 as well as many others create jurisdiction regardless of amount in controversy for claims in admiralty, patent, bankruptcy, antitrust, copyright and maritime cases, claims by or against the United States, claims arising under Acts regulating commerce or providing for internal revenue and many others.

A leading commentator concludes that there are today very few federal question cases for which the omnibus 28 U.S.C. §1331 with its amount in controversy requirement is necessary as a basis for jurisdiction. C. Wright, Handbook on the Law of Federal Courts, 91 (1963).

The Senate Judiciary Committee in 1958 cited claims arising under the Jones Act as the only significant class of federal question cases subject to the requirements of jurisdictional amount. S. Rep. No. 1830, 85th Cong., 2d Sess. (1958). Federal jurisdiction for Jones Act cases is now provided. 46 U.S.C. §688.

[145] *E.g.*, Agricultural Adjustment Act, *Mulford* v. *Smith*, 307 U.S. 38, 46 (1939); Fair Labor Standards Act, *Williams* v. *Jacksonville Terminal Co.*, 315 U.S. 386, 390 (1942); Agricultural Marketing Agreement Act, *Stark* v. *Wickard*, 321 U.S. 288, 290, n. 1 (1944); N.L.R.A., *Capital Service Inc.* v. *NLRB*, 347 U.S. 501 (1954); Railway Labor Act, *Felter* v. *Southern Pac. Co.*, 359 U.S. 326, 329 (1959); *cf.*, *Machinists* v. *Central Airlines*, 372 U.S. 682, 696 (1963); Federal Employers Liability Act, *Imm* v. *Union R.R.*, 289 F. 2d 858 (3d Cir. 1961).

cases thereby brought into federal court are only those against persons acting under color of state law. In any event, the reason behind §1331's closing the door to minor suits is the assumption, generally valid, that justice on such claims can be obtained in state court. That assumption, Congress felt, does not hold true in cases where the state court is asked to rule on the legality of state action by officials of the state.

A holding of no jurisdiction herein will, to the best of our knowledge, leave the categorical assistance titles of the Social Security Act as the only federal regulatory or administrative program in which federal questions can not be litigated in the courts of the United States.[146]

C. *General Federal Question Jurisdiction Under Section 1331 Was Properly Asserted by the District Judge Over the Federal Statutory Claim.*

The District Judge was also required to exercise jurisdiction over the statutory claim on remand because independent jurisdiction, as he held, is conferred over it by 28

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[146] In light of the above arguments, it is not necessary to decide whether actions arising under the Social Security Act, Title IV, fall within 28 U.S.C. §1337, providing jurisdiction for all actions under Acts of Congress regulating commerce. The purposes of the Social Security Act, at its inception during the depression and today, certainly fall within modern constructions of Congress' power to regulate in areas affecting commerce, as was observed in *Shapiro* v. *Thompson*, 394 U.S. 618, 625 (1969) (Warren, *C.J.*, dissenting) in regard to 42 U.S.C. §602. Nor is it necessary to decide whether the Act's guarantees of equal treatment of needy children, and uniformity within a state, viewed against the *ad hoc* administration of pre-depression welfare, suffice to render it an Act of Congress "providing for the equal rights of citizens." But these factors further confirm that actions against state officials to enforce the provisions of the Social Security Act were not, by design at least, intended to be excluded from the federal district courts.

U.S.C. §1331. The claim "arises under" federal law and "the matter in controversy exceeds the sum or value of $10,000."

That the jurisdictional amount requirement applies in cases seeking injunctive or declaratory relief is beyond question. See, e.g., *South Carolina* v. *Seymour*, 153 U.S. 353 (1894). The amount in controversy is measured by evaluating the damage which may be visited on the plaintiff should he be denied relief. It is the "extent of the injury to be prevented" which must pass muster under the 10,000 standard.[147] *Gibbs* v. *Buck*, 307 U.S. 66 (1939); *McNutt* v. *General Motors Acceptance Corp.*, 298 U.S. 178 (1936).

Applying this test, the District Judge found as a matter of fact, amply supported and uncontradicted by the evidence in the record, that plaintiff families "are at or below a base subsistence level" (173), and that denial of relief

> ". . . putting their income substantially below that threshold may threaten injuries to their children's physical and mental development far greater than the mere monetary loss in benefits. *Cf., Brown* v. *Board of Education*, 347 U.S. 483, 494 (1954) (psychological damage resulting from improper schooling). Deprivation during early years may irreversibly retard mental and physical development and have an adverse impact on personality" (174).

Without controverting these findings, the majority below[148] ruled as a matter of law that these injuries from reduced

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[147] 1 Barron and Holtzoff, Federal Practice and Procedure (Wright ed.) §24, n. 54. See generally, Comment, Federal Jurisdiction: Amount in Controversy in Suits for Nonmonetary Remedies, 46 *Calif. L. Rev.* 601 (1958).

[148] As to this issue, Judge Lumbard agreed with Judge Hays' treatment.

grants were "indirect" and, as such "too speculative to create jurisdiction under Section 1331."

The Court of Appeals relied on a series of decisions denying jurisdiction under Section 1331 because the rights sought to be enforced are those to which "no test of money can be applied." *Barry* v. *Mercein*, 46 U.S. (5 How.) 103, 120 (1847) (right to custody of a child); see also, *Kurtz* v. *Moffitt*, 115 U.S. 487 (1885) (habeas corpus case seeking personal liberty); *cf.*, *Hague* v. *Congress for Industrial Organization*, 307 U.S. 496 (1939) (right to speak out against state legislation).[149] These interests are among those for which a damage action is ordinarily unavailable; the right infringed is "utterly incapable of being reduced to any pecuniary standard of valuation," *Barry* v. *Mercein*, *supra*, 46 U.S. at 120. As such they are inapposite here.

The injuries Judge Weinstein found to be the result of the massive cutback of public assistance challenged herein—retardations of physical and mental growth caused by clinical malnutrition and education deprivations at an early age—have long been deemed capable of valuation. For example, were these harms caused or likely to be caused by a negligently manufactured drug, there is no question but that the $10,000 requirement would be satisfied. These damages are not peculiarly difficult to value. Obviously the precise dollar value of such claims cannot be established to a certainty but allegations made in good faith are sufficient. *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U.S.

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[149] These interests might well be treated today as *ipso facto* satisfying the jurisdictional amount because they are not trivial, *Boyd* v. *Clark*, 287 F. Supp. 561, 568 (S.D.N.Y. 1968) (Edelstein, *J.*, dissenting), *aff'd on alternative grounds*, 393 U.S. 316 (1969).

283, 288 (1938). Here the veracity of those allegations is confirmed by unchallenged findings.

The assertion that these harms are "indirect" and too "speculative" cannot mean that they are unlikely to occur. The district court entered findings of fact that these harms will occur as the direct result of severe reductions in the subsistence allowance. The finding, on this record, is not clearly erroneous. The probability of occurrence cannot therefore be discounted as the product of counsel's too vivid imagination. Nor can the District Court finding be overturned by appellate exercise of judicial notice as to the state of the real world. *Oestereich* v. *Selective Service Local Board No. 11*, 393 U.S. 233 (1968) makes clear that questions of jurisdictional amount are to be treated as ones of fact. There a registrant claimed religious exemption from military service. Although plaintiff's interest in seeking such exemption had to do with conscience rather than money, this Court remanded for a factual hearing to ascertain whether the monetary consequences of the Local Board's action met the $10,000 amount requirement.

This is not a case where a plaintiff seeking to vindicate a primary claim obviously worth less than $10,000 seeks to base federal jurisdiction on allegations as to consequential damage. Here computation of the mere monetary loss to plaintiff depends on the difficult question of time period over which the losses to plaintiffs are accrued. Where such difficulties exist, courts do look to the total impact of the challenged action in order to decide the "amount in controversy." *E.g., Oestereich* v. *Selective Service Local Board No. 11, supra.*[180]

[180] See generally, Note, Federal Jurisdictional Amount: Determination of the Matter in Controversy, 73 *Harv. L. Rev.* 1369, 1376 (1960).

Nor is this a case where the harms, even if they are to occur, may be deemed "speculative" and "indirect" on the ground that they are immaterial to the determination of the amount in controversy. The scope of interests to be included in the evaluation of the amount in controversy must be decided with reference to the purposes of the federal law under which relief is sought.[151] The overall national exercise in AFDC is to protect dependent children against the long range harms of economic deprivation in childhood. Congress enacted Section 402(a)(23) out of a recognition of these consequences. Failure to protect children now from these harms renders subsequent legislative efforts mere palliatives.[152] Thus, the precise interest Congress sought to protect by requiring a maintenance of effort was the right of a child to an adulthood free from the crippling

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[151] Thus, in *Marquez* v. *Hardin*, Civ. Action No. 544616 (N.D. Calif. 1969), the District Court was confronted with a claim by plaintiffs that the Secretary of Agriculture was obligated by federal statute and under the Constitution to provide them with the opportunity to participate in the free school lunch program.

> "Although the cost of a school lunch is only thirty-five cents, the amount in controversy for the purposes of §1331 is far greater . . . . As Congress has expressly recognized, the right in question here is to good health, and to full physical and mental development" (Unreported Opinion at p. 11).

In the light of this legislative purpose, the court held that "these rights are not remote or incidental and the damages are not entirely speculative." *Id.* at 12.

[152] The relationship of an inadequate subsistence budget to malnutrition has been noted in hearings held by Senator McGovern recently. Select Senate Committee on Nutrition and Related Human Needs, 90th Cong., 2nd Sess.; 91st Cong., 1st Sess., Parts I-XII (1968-69). Similarly, the relationship of an inadequate subsistence budget to educational opportunity has also been noted in Congress, S. Rep. No. 146, Committee on Labor and Public Welfare, 89th Cong., 1st Sess. (1965); and by the President, H. Doc. No. 45, 111 Cong. Rec. 508 (1965) (President Johnson's Message on Education to the 89th Congress, 1st Session on January 12, 1965).

blight caused by malnutrition and impaired education at an early age. Since these consequential impacts impelled Congress's action, it is improper to deem them "indirect" and not subject to valuation for purposes of the amount in controversy.

Further, we think the jurisdictional amount requirement was also satisfied by the simple monetary loss to individual families which will result from the continued enforcement of §131-a.[153]

Aetna Casualty Co. v. *Flowers*, 330 U.S. 464 (1947), is controlling on this question. *Aetna* was a suit by a mother to determine the right of her family to receive a workmen's compensation claim available under state law. The benefits which the plaintiff there would have been able to receive if she prevailed were, at a maximum, $72 a month, 330 U.S. at 465, a sum substantially smaller than the $174 monthly that appellee Duffy or the $361 monthly that appellee Miley lose as a result of the challenged statute. There, as here, the plaintiff's right to receive the payments might have been defeated by future contingencies. There, even though the payments would cease if the plaintiff remarried or died, the Court held that:

> a possibility that payments will terminate before the total reaches the jurisdictional minimum is immaterial . . . Future payments are not in any proper sense contingent, although they may be decreased or

[153] Monetary loss must be calculated on the basis of the family, since the AFDC (Aid to Families With Dependent Children) grant is made to the family as an integral unit. 42 U.S.C. §606. Grants are not given to individuals or children, but to the parent as guardian of the children. Accordingly the parents sue here on behalf of themselves and their respective children comprising the AFDC family.

> cut off altogether by the operation of conditions subsequent . . . 330 U.S. at 468.

Similarly, here plaintiffs' right to receive lawfully administered payments may be defeated by subsequent events, but it is the right to all the payments under a lawful system which is at issue. The events rendering plaintiffs ineligible for continued receipt of AFDC are no less contingent here than in *Aetna;* indeed they are the same events of death or marriage.

In view of the policy consideration behind the $10,000 requirement, namely to remove petty controversies from the docket of the federal courts,[154] it would seem unwise to impose an exceptionally stringent burden on Petitioners here, where the harms sought to be avoided are monumental, the issues are of nationwide import, and affect the expenditure of millions. While these factors would not excuse plaintiffs from compliance with the technical requirements of jurisdictional amount, they bear upon the appropriate standards for reckoning that amount.

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[154] In 1958 the jurisdictional amount was raised to $10,000,

> "on the premise that the amount should be fixed at a sum of money that will make jurisdiction available in all substantial controversies where other elements of Federal jurisdiction are present. The jurisdictional amount should not be so high as to convert the Federal courts into courts of big business nor so low as to fritter away their time in the trial of petty controversies." S. Rep. No. 1830, 85th Cong. 2d Sess. at 3-4 (1958); 1958 U.S. Code, Cong. & Admin. News, pp. 3099, 3101.

CONCLUSION

The mandate of the Court of Appeals reversing summary judgment and vacating the preliminary and permanent injunctions should be reversed.

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

CIVIL ACTION NO. 68-2092 SECTION "E"

SHIRLEY LAMPTON, *et al.*,

Plaintiffs,

—v.—

GARLAND L. BONIN, *et al.*,

Defendants.

BRIEF OF ROBERT H. FINCH
SECRETARY OF HEALTH, EDUCATION, AND WELFARE
AS AMICUS CURIAE

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Statement

In its program of Aid to Families with Dependent Children pursuant to title IV, part A of the Social Security Act,[1] Louisiana has computed the budgeted financial need of the recipients for a month, and subtracted their income. Assistance has then been paid in the amount of the budgetary deficit, but not in excess of certain maximums. In the

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[1] The program is referred to by Louisiana as "ADC", and that term will be used in this brief.

Title IV, part A, of the Social Security Act contains sections 401-410; the corresponding citation to the United States Code is 42 U.S.C. 601-610. The sections of title IV will not be cited to the United States Code in this brief.

present case, all of the individual plaintiffs were receiving the family maximum of $163 per month, although their budgetary deficits were higher.

In October 1968, the Commissioner of the Louisiana Department of Public Welfare announced a 10% reduction in the amount of the ADC grants, to be effective November 1968. Thus, the individuals plaintiffs in this case would receive $147 per month. The need for the reduction was attributed to the increase in the ADC caseload as a result of the decision of the United States Supreme Court in *King* v. *Smith*, 392 U.S. 309 (1968), which prohibited denial of ADC to otherwise eligible children because they are considered to have a substitute father.

Plaintiffs attacked the reduction, essentially on three grounds:

1. The lack of a corresponding reduction under Louisiana's other public assistance programs (old-age assistance, aid to the blind, etc.) denies equal protection and due process of law guaranteed by the Fourteenth Amendment and denies the protection of Federal regulations regarding determination of the amount of assistance according to statewide public assistance standards.

2. Since most of the families added to the ADC caseload as a result of *King* were Negro, their addition redressed prior racial discrimination, and since ADC has a larger proportion of Negroes than Louisiana's other public assistance programs, the reduction of ADC grants without a corresponding reduction under the other programs constitutes discrimination on account of race in violation of title VI of the Civil Rights Act of 1964.

3. Since Louisiana's action would have the effect of reducing the maximum payments received by plaintiffs, it is contrary to section 402(a)(23) of the Social Security Act, which was enacted on January 2, 1968 and requires that the Louisiana ADC plan must

> "(23) provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted."

Louisiana has argued that this is a suit to compel payment of public funds from the State Treasury to plaintiffs and is barred by the Eleventh Amendment; that there is no denial of equal protection or due process; that no racial discrimination is involved; that section 402(a)(23) of the Social Security Act does not require or prohibit any action of the State prior to July 1, 1969, and that, notwithstanding this provision, the State may at any time reduce public assistance payments if its funds are insufficient.

Because of the many aspects of this case involving administration of Federal statutes for which the Department of Health, Education, and Welfare has Federal responsibility, and particularly because of the relevance of the Department's regulation interpreting section 402(a)(23) of the Social Security Act, the court invited the Department to file a brief amicus curiae.

Summary

On the question of Louisiana's reduction of ADC grants without corresponding reductions under its other public assistance programs, no views are expressed herein on the Constitutional issues. Insofar as the provisions of the Social Security Act and the implementing Federal regulations are concerned, each public assistance title of the Act provides for a separate State plan. Though there are many common features, each plan or program is separate. A change in payment in one financial assistance program, e.g., ADC, presents no question under any of the other financial assistance programs, e.g., OAA.

No views are expressed herein regarding the alleged discrimination in violation of title VI of the Civil Rights Act of 1964. This seems to be largely a question of fact as to whether there is discrimination on account of race in Louisiana's ADC program.

The Department has interpreted section 402(a)(23) of the Social Security Act as it reads. State ADC plans must provide that by July 1, 1969 certain actions will have been taken. States are not required to take such actions before that date, nor are they precluded from taking contrary actions before that date.

By July 1, 1969, however, need standards must have been updated and maximums must have been proportionately adjusted. If living costs in Louisiana have risen, the State's maximums on payments must be raised proportionately. A so-called "percentage reduction" in payments, applied to the maximums, would be an obvious circumvention of the statute, and would be contrary to the implementing Federal

regulation. The Federal regulation allows for ratable reductions in payments based on the standard of need (a method used in some States, not including Louisiana), but does not permit reductions in payments based on arbitrary maximums.

ARGUMENT

A. *Louisiana's reduction in ADC payments without a corresponding reduction in its other financial assistance programs does not violate the Social Security Act or the Federal regulations.*

[This argument has been deleted in printing.]

B. *Section 402(a)(23) of the Social Security Act does not require or prohibit action by the States in their ADC programs prior to July 1, 1969.*

1. In view of the lack of indication of Congressional intent to the contrary, section 402(a)(23) should be interpreted as it reads.

Under section 402(a)(23) of the Social Security Act, a State ADC plan must

> "(23) provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted."

As the papers in this case indicate, much can be read into this provision. Yet, its words alone are readily understandable. They require by July 1, 1969, an updating of

need standards and a proportionate adjustment of any maximums imposed by the State on the amount of aid paid. As will be developed below, for a particular State this can mean very little or a great deal, depending on the State's methods and practices for determining the amount of payment.

That this provision might mean very little in a particular State is completely consistent with its legislative history. The Congress could hardly have paid less attention to it.

The provision was enacted by section 213(b) of P.L. 90-248, 81 Stat. 898. As originally added by the Senate Finance Committee, it would have required that the States take the prescribed actions by July 1, 1969, "and at least annually thereafter." The annual feature was dropped in Conference.

Section 213(a) of P.L. 90-248 amended the "adult" titles to allow States at their option to disregard not more than $7.50 per month of any income instead of the previous ceiling of $5 per month. No change was made in the $5 ceiling for ADC. In the committee reports, most of the attention was given to section 213(a).

Thus, the Senate Report, under the heading "Increasing the benefits for the aged", discussed the provision for the adult categories at some length, then added noncommittally,

> "States would be required to price their standards used for determining the amount of assistance under the AFDC program by July 1, 1969 and to reprice them at least annually thereafter, adjusting the standards

and any maximums imposed on payments to reflect changes in living costs." S. Rep. No. 744, 90th Cong., 1st Sess. 170 (1967).

In the summary of principal provisions of the bill, the report refers only to the provision for the adult categories, and is silent on the ADC provision. S. Rep. No. 744, 90th Cong., 1st Sess. 29 (1967).

The Conference Report, under the heading "Increasing income of recipients of assistance", reflected only the changes that had been made in Conference. On ADC, it stated

"Under the agreement, the new section 402(a) provision (for adjustments to reflect living costs) would require States to make only one adjustment before July 1, 1969, after which date the provision would not apply." H.R. Rep. No. 1030, 90th Cong., 1st Sess. 63 (1967).

The "Summary of Social Security Amendments of 1967", a Committee Print of a Joint Publication of the Senate and House Committees (90th Cong., 1st Sess., December 1967) (copy attached), referred to the contents of section 213 under the heading "Pass Along" (page 19), mentioning only the amendment to the adult categories, without any reference to the ADC provision. It is also significant, though hardly surprising, that the cost estimates on the bill as agreed to by the Conference Committee (Table 5 of the Joint Publication, page 28) did not reflect anything for section 213. Clearly, no great cost effect was anticipated.

One can speculate about what Congress may have intended by the enactment of section 402(a)(23) of the Social Security Act, in light of Administration proposals that were not enacted, other provisions of the Social Security Amendments of 1967 (P.L. 90-248), and other such remotely relevant factors. We shall discuss some of them later. But the history of section 213(b) of P.L. 90-248 itself—what the Congress did not say about it—makes it clear that such speculations are only that. Beyond the words themselves, there is no guide to the meaning and intent of section 402(a)(23), and its relationship to other provisions of title IV, part A, of the Social Security Act.

The Congress enacted a provision that could mean a little or could mean a lot, and obviously considered it hardly worthy of mention. This certainly suggests that no more should be read into the provision than the words themselves can plainly sustain. In discussing this provision in another context, a three-judge district court in *Williams* v. *Dandridge* (C.A. No. 19250 D. Md.), in a supplemental opinion filed on February 25, 1969 (copy attached), commented on the brevity of the discussion of section 213(b) in the legislative reports (p. 19), the lack of explanation of its purpose or need (p. 15, n. 8), the lack of evidence of considered judgment by the Congress as to its collateral effects (pp. 18-19), and the uncertainty as to Congressional intent (p. 20).

Against this background, we believe that, in its proper application, section 402(a)(23) should be interpreted as it reads, to carry out the intent of its words, and not some more remote and speculative purposes.

2. Louisiana has until July 1, 1969, to comply with the adjustment requirements of section 402(a)(23).

Section 402(a)(23) of the Social Security Act requires that a State ADC plan must provide that "by July 1, 1969," certain prescribed actions will have been taken. On their face, these words are satisfied if the State has complied by that date. Nothing is said about what the States may do or not do before that date.

We do not disagree with the surmise of the parties as to why the date of July 1, 1969 was chosen by the Congress. In some States, compliance with section 402(a)(23) might necessitate legislation, if for example the State had a maximum on payment which was prescribed by statute. Similarly, if need standards were raised and the State made correspondingly higher payments—leaving aside, for now, the question whether the State must make higher payments—additional appropriations would be needed. By July 1, 1969, every State would have had a legislative session subsequent to January 2, 1968, the date of enactment of P.L. 90-248, and thus would have had opportunity to amend its statutes or to appropriate funds in light of section 402(a)(23).

The fact that Louisiana had a legislative session in 1968 does not mean that there was a different effective date for Louisiana. While the Congress, in setting the date of July 1, 1969, thereby allowed time for each State to have a legislative session, the statute nevertheless provides the same deadline for all States, "by July 1, 1969," irrespective of whether any particular State had an earlier legislative session or indeed could have complied without a legislative session. There is a single nationwide deadline.

When the Congress has wished to make a provision affecting the public assistance programs effective on a staggered basis according to the need and opportunity for State legislative action, the Federal statute has so provided. Section 204(c)(1) of P.L. 90-248, 81 Stat. 892;[5] section 407 of P.L. 89-97, 79 Stat. 422.[6]

Consequently, a judgment whether Louisiana has complied with section 402(a)(23) cannot be made until July 1, 1969. The State might take contrary actions before that date and still comply by July 1, 1969. This is not meant to suggest that a State could reduce its need standards or maximums subsequent to January 1, 1968, and then ad-

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[5] Section 204(b) of P.L. 90-248 amended section 402(a) of the Social Security Act by adding a new requirement for ADC plans. Section 204(c)(1) of P.L. 90-248 provides that:

"The amendment made by subsection (b) shall in the case of any State be effective on July 1, 1968, or if a statute of such State prevents it from complying with the requirements of such amendment on such date, such amendment shall with respect to such State be effective on July 1, 1969 . . . ."

[6] Section 701(a) of the Economic Opportunity Act of 1964, P.L. 88-452, 78 Stat. 534, enacted August 20, 1964, imposed new requirements for State plans under the Social Security Act effective upon enactment. Section 701(b) of P.L. 88-452 had the effect of postponing the effective date until July 1, 1965, for States which were prevented by a State statute from complying with the new requirements. Section 407 of P.L. 89-97 was enacted to provide a further extension of the grace period. It reads:

"Notwithstanding the provisions of section 701 of the Economic Opportunity Act of 1964, no funds to which a State is otherwise entitled under title I, IV, X, XIV, or XIX of the Social Security Act for any period before the first month beginning after the adjournment of a State's first regular legislative session which adjourns after August 20, 1964 (the date of enactment of the Economic Opportunity Act of 1964), shall be withheld by reason of any action taken pursuant to a State statute which prevents such State from complying with the requirements of subsection (a) of such section 701."

just only for changes in living costs which occurred in the period after such reduction. This would be an obvious evasion of section 402(a)(23). The State's action to comply must give full effect to changes in living costs since need standards were last established before January 2, 1968.

A State could choose to comply with section 402(a)(23) earlier than July 1, 1969. Since living costs continue to rise, the longer the State delays, the greater will be the rise in its need standards and maximums. This is particularly important since section 402(a)(23) provides only for a single adjustment by July 1, 1969, and did not retain the feature of subsequent annual adjustments as provided by the Senate.

We note, also, that Louisiana has not yet made its adjustment of its need standards to reflect changes in cost of living.[7] Consequently, it is too early to know by what amount the State's maximums must be "proportionately adjusted." This further points up that Louisiana's 10% reduction in ADC payments is not part of its compliance or noncompliance with section 402(a)(23), but responds to a different problem. As will be discussed below, we believe that, in terms of compliance with section 402(a)(23), Louisiana's action would not be acceptable. But it is too early to make any judgment whether Louisiana has complied.

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[7] Moreover, the State has not yet amended its plan to include the provision, as required by section 402(a)(23), that by July 1, 1969, the required adjustments will have been made.

C. *Section 402(a)(23) requires adjustment of maximums on ADC payments; it does not require or preclude ratable reductions in payments based on the standard of need.*

What has already been said would dispose of the case for now, insofar as section 402(a)(23) is concerned. However, the court appears to have specifically invited our views on the validity of the Department's regulation implementing section 402(a)(23). 45 CFR 233.20(a)(2)(ii), 34 FR 1394 (1969). This requires a rather extensive excursion into some related and background matters.

1. The specific requirements of section 402 (a)(23) must prevail over the general statements in section 401.

In *King* v. *Smith*, the opinion of the court stated,

> "There is no question that States have considerable latitude in allocating their AFDC resources, since each State is free to set its own standard of need and to determine the level of benefits by the amount of funds it devotes to the program." 392 U.S. at 318-319 (footnotes omitted).

This is a correct general statement of the State's authority in the public assistance programs.[8] Each of the pertinent titles of the Social Security Act requires that a State plan must contain certain provisions (e.g., section 402(a) of the Act), and the Secretary shall approve any plan which

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[8] The court's opinion made no reference to section 402(a)(23). For purposes of *King*, a general statement of the States' role was sufficient. Moreover, although section 402(a)(23) was in effect at the time of the *King* decision on June 17, 1968, the deadline of July 1, 1969 was over a year away. The implementing Federal regulation has not yet been published. The belated general awareness of section 402(a)(23) is also reflected in the supplemental opinion in *Williams* v. *Dandridge*.

fulfills these conditions (e.g., section 402(b) of the Act). With the exception of section 402(a)(23), none of these provisions limits the States in setting their need standards or level of benefits. Federal payments are made in respect to expenditures under an approved plan (e.g., section 403(a) of the Act) which are for aid to certain "needy" individuals (e.g., section 406(a) of the Act). The term "needy" is not further defined. Federal appropriations are authorized for furthering certain stated purposes by "enabling each State to furnish financial assistance . . . , as far as practicable under the conditions in such State, to needy . . ." individuals (e.g., section 401 of the Act).

Section 402(a)(23) is a striking exception to the basic statutory scheme. It is all the more striking that such a departure from the prior overall pattern of the public assistance programs and the existing Federal-State relationships was made with hardly a word of Congressional comment and with no evidence of considered judgment of the implications. This further bespeaks the need to give no greater effect to this provision than it in words commands.

Nevertheless, whatever section 402(a)(23) requires must be undertaken by the States in their ADC plans and carried out. This is a plan condition, and a failure by a State to make the commitment and implement it would present a question of whether the State plan can continue to be approved by the Secretary as being in conformity with the requirements of the Social Security Act. Louisiana suggests that, notwithstanding section 402(a)(23), it is bound to furnish financial assistance only as far as practicable under the conditions in the State. But whatever utility the statement of purpose in section 401 may have as a factor in interpreting ambiguous provisions of the Act, the

generalities of that section do not override the specific conditions set forth by the Congress for State plans. If updating standards and adjusting maximums make it necessary for Louisiana to appropriate additional State funds, this is one of the things the State must do to carry out its approved ADC plan.

2. Inadequate payments of assistance may result from underpriced standards of need, maximums on payments, or percentage reductions.

While a State is generally free to set its own standard of need for a public assistance program, the Federal regulations require that there must be a Statewide standard, expressed in money amounts. 45 CFR 233.20(a)(2)(i), 34 F. R. 1394 (1969). To make adequate assistance payments, a State would use a standard which includes all items needed by the recipients, priced at current levels in accordance with some recognized low-income budget. The State would then deduct income of the recipients (subject to allowable exemptions) and would make assistance payments in the amount of the remaining budgetary deficit.

Most States do not make adequate assistance payments, and this can result from one or another, or a combination, of the following factors. The State may not include all necessary items in its standard of need (or budget). The budget may be priced too low; there is much room for argument as to what is an adequate low-income budget. Or the budget may not be kept up to date, so that it does not keep pace with changes in costs.

Whatever the standard of need, the program may not have enough funds to pay on that basis. A few States simply prorate the funds. For example, if the need standard is $100 a month, and the State pays 80% of need, an in-

dividual without other income would receive $80 per month. For individuals with income, such States may take the stated percentage of the need standard, subtract income, and pay the deficit; or they may take the need standard, subtract income, and pay the stated percentage of the remaining unmet need or budgetary deficit. We refer to these methods as "percentage reduction." See Appendix A.

A greater number of States impose flat maximums. After computing the budgetary deficit, they pay only up to stated dollar amounts. See Appendix B. In some of these States, there is a family maximum in ADC. The full budgetary deficit is paid except that no family can receive more than the stated number of dollars; thus, small families receive their full budgetary deficit, but large families receive only the maximum. A greater number of States have maximums in ADC, in steps, for each size of family, and most of these States also have a family maximum.[9] As may be seen from Appendix B, Louisiana's maximums, for a caretaker (parent or other relative) and varying numbers of children are as follows:

1 child	—	$80 per month
2 children	—	$99
3 children	—	116
4 children	—	133
5 children	—	145
6 or more children	—	163 (family maximum)

While any failure of a State to make payments on the basis of its own standard of need results in inadequate

[9] This resume of State methods does not cover all the details of how all the States compute their ADC payments. Hopefully, it gives enough of a picture for purposes of this brief.

payments, the use of dollar maximums adds an element of arbitrariness. Family maximums, in particular, result in patently different treatment of individuals. In *Williams* v. *Dandridge,* supra, the court concluded that Maryland's family maximum in ADC denied equal protection to children in large families. See also, *Collins* v. *State Board,* 81 N.W. 2d 4 (Iowa 1957). In the present case, all of the individual plaintiffs receive the family maximum, although their budgetary deficits vary considerably. Similar relative inequity may result among smaller-sized families in Louisiana (less than 6 children) because of the maximum, but to a lesser degree.

3. Section 402(a)(23) deals only with some aspects of pricing of need standards, and with a corresponding adjustment of maximums, and not at all with percentage reductions.

Against this background, it can be readily seen that section 402(a)(23) deals with some of the methods and procedures that are used in the computation of assistance, but not all, and then only in a partial way. The State's need standards must be adjusted to reflect fully changes in living costs since such amounts were established. In short, the standards must be updated for price changes since the last time they were priced (before January 2, 1968). This does not say that a State must use a particular price index, or must add need items which were previously omitted, or must even reflect current prices. Rather, if the need standard was last priced at $100 in 1963 (whether or not at full current prices at that time), and living costs have since risen by 20%, the need standard must now be priced at $120.

Maximums must be raised proportionately. Thus if, in the same State, a maximum was set at $80 in 1963, it must now be raised by 20% to $96.

If, however, a State had no maximums, but used percentage reductions, no change in the percentage reduction is required or precluded. If the State previously had a standard of need of $100, and paid 80% of need, the recipient would receive $80 per month. If the need standard were now raised to $120 to reflect a rise in living costs, and the State continued to pay 80% of need, the recipient would receive $96. The rise in living costs would be thus passed on to the recipient if the percentage reduction remained unchanged. It seems obvious that section 402(a)(23) does not require that a percentage reduction be "proportionately adjusted." If the percentage paid by the State also had to be raised by the rise in living costs, in the example above, the State's need standard would be raised by 20% to $120 and the State would pay 96% of need (instead of 80%), resulting in a payment of $115 (instead of $80), a rise more than double the 20% rise in living costs. In some States, such an adjustment in the percentage reduction could require payment of more than 100% of need. In short, it appears that section 402(a)(23) just does not refer to percentage reductions. It does not require that they be adjusted, or that they remain the same, nor does it preclude changes in their amount.

The fact that section 402(a)(23) does not affect percentage reductions allows States to retain considerable flexibility as to the amount of their assistance payments. We return to our example where a State with a need standard of $100 paid 80% of need, and the recipients received $80. Because of a 20% rise in living costs, the State's need

standard is raised to $120. Such a State could now pay 66-2/3% of need, and the recipients would still receive $80. Or the State could pay 100% of need, or 80%, or 50%, according to the available funds. States which formerly paid 100% of need might now change and pay a lesser percentage. States with a system of maximums might in addition compute payments on the basis of a percentage of need.

These options, if used by a State, might offset in part what would otherwise be the effect of section 402(a)(23). But they would not be contrary to section 402(a)(23). The language and the legislative history of that provision are completely consistent with its having only modest results, if the State so chooses.

We would emphasize that section 402(a)(23) would not thereby be nullified. It would have some significant effects. If the need standard is raised to reflect higher living costs, additional individuals become eligible for ADC. In our example, if the need standard goes from $100 to $120, more individuals with income will now be eligible. They will receive small assistance payments, and also medical care (under the State's title XIX plan in most States) and a variety of social and rehabilitative services. In addition, the updating of the need standards will make the standards more realistic in light of current conditions. This will give important information about the needs of assistance recipients to State agencies, State legislators and officials, and the public. In those States using maximums, the maximums will be raised, directly benefiting the recipients whose payments are limited by the maximums. To the extent that States with inadequate funding of their public assistance programs turn to percentage reductions rather than maximums, there will be a more equitable system of

distributing the funds, without the arbitrariness of the maximums. At the least, section 402(a)(23) will have some marked effects in the ADC programs of the several States.

4. That section 402(a)(23) leaves some flexibility to the States in determining the amount of ADC payments is consistent with the language of that provision, its legislative history, and other aids to statutory construction.

To this point, in explaining what we believe to be the proper construction of section 402(a)(23), we have referred only to those factors which we believe are necessary, at a minimum, for an understanding of that provision. But there are many other factors which, in combination, reinforce our conclusion that while section 402(a)(23) imposes requirements that will have significant effects on State ADC programs, nevertheless the States are left with flexibility to distribute their funds, if inadequate, among the recipients on an equitable basis (through percentage reductions) even though this might mean that a rise in need standards to reflect higher living costs might not result in higher payments to the recipients. In this section of the brief, we shall discuss the various factors together.

a. The internal language of section 402(a)(23).

We have already indicated our view that the word "maximums" in section 402(a)(23) refers to dollar maximums and not to percentage reductions. The requirement that "any maximums that the State imposes on the amount of aid paid to the families will have been proportionately adjusted" is readily applicable to dollar maximums but, as pointed out above, makes no sense when applied to percentage reductions.

We also note that the term "maximums" has been used over the years in the public assistance programs to refer to dollar maximums. Enclosed is a copy of "Characteristics of State Public Assistance Plans under the Social Security Act, General Provisions—Eligibility, Assistance, Administration," Public Assistance Report No. 50, 1964 ed. For each State, Item 9 on "Assistance and services provided" contains an entry under "Maximum money payment to recipients." These entries refer in all cases to dollar maximums. Appendix B to this brief is an updating of this item of the "Characteristics." It is noteworthy that the information in Appendix A to this brief, dealing with percentage reductions, was collected in a special study, and not as a part of the ongoing effort to have current information on "maximums" for the "Characteristics."

We could multiply instances where the term "maximums" has been used to refer to dollar maximums, as contrasted with, or exclusive of, percentage reductions. We do not maintain that there has never been confusion about the two methods, or that the term "maximums" has never been used to refer to both methods. However, in official publications of this Department, including the "Characteristics," "maximums" has meant dollar maximums.

b. *Legislative history of section 402(a)(23).*

We have already recounted in full the meager legislative history of section 402(a)(23). Congress paid scant attention to this provision. No specific cost was assigned, indicating that no great cost was expected. These factors suggest that an expensive requirement was not being imposed on the States mandatorily.

Plaintiffs argue that section 402(a)(23) should be interpreted in light of other proposals which were not enacted. However, their nonenactment would suggest that we should look rather to what the Congress did enact. In any event, these abortive proposals are readily distinguishable from section 402(a)(23). One is struck by the differences rather than any similarities.

The Administration proposal for the "Social Security Amendments of 1967" (H.R. 5710, 90th Cong., 1st Sess.) contained a requirement whereby in all the programs providing for subsistence payments the States would be required, effective July 1, 1969, to meet full need under their standards, and, effective July 1, 1968, to review the standards annually and, to the extent prescribed by the Secretary, update them to take into account changes in living costs. Section 202 of H.R. 5710. A separate appropriation of $60,000,000 for each fiscal year beginning with 1970 was authorized for additional Federal payments to States to meet the non-Federal share of cash assistance expenditures occasioned by certain provisions of H.R. 5710. Section 206. Among these provisions was section 202. Thus, H.R. 5710 was clear and specific as to what the States must do by way of making payments in ADC and the other titles, and specific recognition was given to the resulting added costs to the States. In addition, it was estimated that it would cost the Federal government an additional $150 million annually if all States made assistance payments on the basis of meeting full need as they themselves define it. An additional $100 million would be needed for States to bring their need standards up to 1967 prices. Hearings before the Committee on Finance, U. S. Senate, 90th Cong., 1st Sess., on H.R. 12080, p. 254. For ADC alone, the total costs

for fiscal year 1970 were estimated at $95 million for requiring that cash payments meet full need under State standards and an additional $90 million for requiring States to update their standards. Senate Hearings on H.R. 12080, pp. 721-2.

The "Social Security Amendments of 1967" as passed by the House (H.R. 12080, 90th Cong., 1st Sess.) contained no provisions along these lines. The Administration renewed its request for these provisions before the Senate (Senate Hearings on H.R. 12080, pp. 255-260, 634-637), and again did not meet with success.

As passed by the Senate, section 213(a) of H.R. 12080 would have amended the adult categories to require that each recipient would have an increase of $7.50 per month in his total amount of assistance and other income.[10] This was primarily intended to assure that the increase being made by H.R. 12080 in old-age, survivors' and disability insurance benefits would be passed along to those beneficiaries who received public assistance, and would not result merely in an offsetting reduction in public assistance. While the statutory provision spoke of need standards and

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[10] Thus, it would have been required that a State plan for old-age assistance must be "effective July 1, 1968, provide that the standards used for determining the need of applicants and recipients for and the extent of such assistance under the plan, and any maximum on the amount of assistance, will be so modified that an increase in the amount of assistance and other income will be no less than $7.50 per month per individual (determined on an average per individual in accordance with standards prescribed by the Secretary) above such amount of assistance and other income available under the standards and maximum applicable under the plan on December 31, 1966 (as of June 30, 1966, if the State plan includes provisions for automatic cost-of-living adjustments in assistance under such plan);".

maximums, the key language is a direction that "an increase in the amount of assistance and other income will be no less than $7.50 per month per individual." The desired result was clearly specified. In absence of this language, the meaning of the references to need standards and maximums would have been just as murky as has been discussed in relation to section 213(b) of P.L. 90-248.

Most ADC recipients would not benefit from the increase in old-age, survivors' and disability insurance benefits. For them, the Senate provided an annual updating of need standards to reflect changes in living costs and a proportionate adjustment of maximums. Though there were superficial resemblances to some words and provisions in the Administration's original proposals and in section 213(a), section 213(b) lacked the specification of results that was found in these other proposed amendments. This does not appear to have been an accident. While neither the Senate nor the Conference gave any real indication of its intent, section 213(b) seems to represent in part an attempt to avoid the appearance of doing nothing in the ADC program. It was a gesture of uncertain meaning and effect, suggesting on its surface something more than it actually required on closer inspection.

It also seems quite significant that when the amendment was proposed on the Senate Floor to add a provision to section 213(b) to require an increase in payment of $4 per month for each ADC recipient, corresponding to the $7.50 per month increase for each recipient in the adult programs, the amendment was rejected without even a division or the yeas and nays. It was estimated that this amendment would cost $79.4 million annually in Federal funds and $135.6 million annually in non-Federal expendi-

tures. 113 Cong. Rec. 16963-4, Nov. 21, 1967 (daily ed.). Thus, the Senate was unwilling to require what would be an actual cost-of-living increase of $4 per month, and the bill retained only the vague suggestion of an increase contained in section 213(b). Senator Long, the Chairman of the Finance Committee, spoke against the amendment, emphasizing that it would require the States to find money they did not have. Senator Kennedy of New York expressed his disappointment that the amendment was not considered with more care, since it was designed to erase a serious discrimination in the bill. The Senators seem to have understood clearly that the requirements of section 213(b) did not guarantee that ADC recipients would actually receive increased payments.

In the Conference, as previously recounted, the $7.50 per month mandatory increase in the adult categories was changed to a provision, optional with the States, for disregarding not more than $7.50 per month of income instead of $5. In the ADC proposal, there was less to make optional with the States. Even so, the requirement for annual updating of need standards was dropped. States would be required "to make only one adjustment before July 1, 1969, after which date the provision would not apply." H.R. Rep. No. 1030, 90th Cong., 1st Sess. 63 (1967).

c. *Other aids to statutory construction.*

When we range further in search of meaning for section 402(a)(23), the clues become less precise. Thus, defendants argue that section 401 limits their liability for financial assistance to what is practicable under the conditions in the State. Plaintiffs might counter that the purpose of

the ADC title is to furnish financial assistance. Similarly, it could be pointed out, for defendants, that the Social Security Amendments of 1967 for the most part embodied the views of the House rather than the Senate. H.R. 12080, as passed by the House, omitted any provision like section 213; the Conference made section 213(a) optional rather than mandatory, and presumably would have further softened section 213(b) had it imposed any serious requirement on the States. This view has been countered by the argument that the 1967 Amendments were generally onerous from the point of view of the recipients, and section 213(b) was intended at least to give them a cost-of-living rise in payments. Thus, the arguments range from the speculative to the fanciful.

We believe, however, that two points are of some significance. First, section 213(b) was a departure from the settled principle under the public assistance titles that the standard of need and the level of benefits were matters within the State's discretion. While section 213(b) made a definite exception to this principle, we submit that, in absence of any evidence of considered judgment by the Congress of the implications, this provision should be applied in accordance with its words, and not more broadly.

In addition, we note that section 213(b), as finally enacted, called only for a one-time action by July 1, 1969. This presents a problem as to how long the State's action must be sustained. Forever? Five years? One year? Less? If the States had been required to reprice their standards every year, it would have been clear that no backsliding was to be allowed. But a one-time action to meet conditions at a specified date is soon overtaken by

the press of later developments. There is no indication that the Congress was imposing an immutable, permanent adjustment of payments, regardless of the condition of the State's ADC program or the State's financial condition. This, in turn suggests that, in 1969 itself, room was being left for the play of these factors. Standards would be updated and maximums adjusted, but the State's flexibility in operating within the available funds was otherwise left unimpaired.

D. *The implementing Federal regulation, 45 CFR 233.20(a)(2)(ii), is completely consistent with section 402(a)(23) of the Act.*

The Federal regulation implementing section 402(a)(23) reads as follows:

> "In the AFDC plan, provide that by July 1, 1969, the State's standard of assistance for the AFDC program will have been adjusted to reflect fully changes in living costs since such standards were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted. In such adjustment a consolidation of the standard (i.e., combining of items) may not result in a reduction in the content of the standard. In the event the State is not able to meet need in full under the adjusted standard, the State may make ratable reductions in accordance with subparagraph (3)(viii) of this paragraph. Nevertheless, if a State maintains a system of dollar maximums, these maximums must be proportionately adjusted in relation to the updated standards." 45 CFR 233.20(a)(2)(ii), 34 F.R. 1394 (1969).

We believe that this regulation is completely consistent with the provisions of the Social Security Act as heretofore explained in this brief.

The first sentence of the regulation virtually repeats the language of section 402(a)(23), and echoes the requirement of the Social Security Act that State ADC plans must contain the prescribed condition on updating need standards and adjusting maximums by July 1, 1969. Reference is made to the State's standard of assistance, the terminology used in the regulations, instead of the statutory reference to the amounts used by the State to determine the needs of individuals.

The second sentence of the regulation deals with the updating of the State's standard of assistance. Over the past few years, States have been simplifying their methods of determining the amount of assistance payments. Contributing factors have been Federal urging (see 45 CFR 233.20(a)(2)(iv)), and the general movement toward simplifying methods of determining eligibility for assistance. If a State last priced its assistance standard several years ago, and now is simplifying its standard as well as repricing it, question may arise whether the content of the new standard is equivalent to that of the old, and whether the elimination of items or the combination of items in the standard results in a contraction in the content of the standard that offsets in whole or in part the adjustment of prices to reflect changes in living costs. The second sentence of the regulation seeks to foreclose this possibility and to assure that the repricing will apply to at least the same scope of items as the previous pricing before January 2, 1968.

The third sentence of the regulation deals with the problem faced by States which update their standards and adjust their maximums, but are faced with inadequate funds to meet the cost of their ADC programs. For many reasons, not excluding court decisions, ADC caseloads have been rising dramatically and unpredictably. Actual costs have outstripped estimates by a considerable margin, both Federally and in the States. The Congress has respected the "open-end" appropriation feature of the public assistance programs. Many States, however, do not have a comparable feature, and limit their appropriations. Some Legislatures may make inadequate appropriations; others may make appropriations which are adequate on the basis of estimates, but which turn out to be insufficient. Some States do not make supplemental appropriations for public assistance; whatever is appropriated must do, often for a biennium.

In all of these situations, unless section 402(a)(23) is far more revolutionary than we believe there is any reason to suppose, the State welfare agencies may make downward adjustments in the amount of ADC payments. Section 402(a)(23) forecloses doing this by reducing the assistance standard or the maximums. While we have reiterated our view that section 402(a)(23) means no more than it says, we believe equally that it does mean what it says. The pricing of the assistance standard must be updated and the maximums must be adjusted. To make these changes and then reverse them because of inadequate funds would fly in the face of the statutory requirement, and cannot be accepted.

The method that is left open to the States is to make ratable reductions, i.e., percentage reductions applied to

the standard of assistance (before or after the subtraction of income). The cross-reference in the third sentence of the regulation to 45 CFR 233.20(a)(3)(viii) is merely a reminder that such a reduction must be applied Statewide. The latter provision states:

> "Provide that payment will be based on the determination of the amount of assistance needed and that, if full individual payments are precluded by maximums or insufficient funds, adjustments will be made by methods applied uniformly statewide."

We note, in passing, that this provision, too, makes a verbal distinction between reduction of payments because of "maximums" and because of "insufficient funds." While maximums often result from insufficient funds, they have an independent arbitrary aspect which may limit payments even where funds are otherwise adequate. It is these maximums, and this method of dealing with inadequate funding, to which we believe that section 402(a)(23) is solely directed. We submit that, in the light of the words and history of section 402(a)(23), the third sentence of the Federal regulations, permitting ratable reductions in relation to the standard of assistance, is not merely reasonable, but is inescapably compelled.

The fourth sentence of the regulation is an attempt to avoid the very kind of misunderstanding that may have arisen in this case. It is meant to emphasize that maximums must indeed be proportionately adjusted in relation to the repriced standard of assistance. Because of the reference in the third sentence to the permissibility of ratable reductions, and the cross-reference to section 233.20(a)(3)(viii), which indicates that maximums can be adjusted if funds

are inadequate, it was anticipated that some States might conclude incorrectly that they could adjust their maximums in relation to the repriced standards, then turn right around and reduce the maximums because of inadequate funds. The fourth sentence was intended to forestall this confusion, and to make it clear that the requirement of adjustment of maximums was not intended to be qualified by the third sentence and its cross-reference. If funds were inadequate, ratable reductions could be made in relation to the standard of assistance, not in relation to the maximums.

It hardly needs saying that the Federal agency strongly recommends that States pay assistance in full on the basis of current standards. The regulation, however, deals with what is required by section 402(a)(23), and what States may or may not do under that section.

E. *Louisiana has not yet purported to comply with section 402(a)(23), and the July 1, 1969 deadline for compliance has not arrived. A reduction in ADC payments, applied to Louisiana's maximums, would not be in compliance with section 402(a)(23).*

The application of the foregoing discussion to Louisiana's situation seems clear. Louisiana has not purported to comply as yet with the requirements of section 402(a)(23). The State has not submitted an amendment to its ADC plan, undertaking the commitment prescribed in the Social Security Act. So far as we are aware, the State has not, after January 1, 1968, repriced its standard of assistance to reflect changes in living costs since the previous repricing. Until this is done, the amount of the required propor-

tionate adjustment in Louisiana's maximums is not even known.

The July 1, 1969, deadline for compliance with section 402(a)(23) has not yet arrived. It is too early to make any judgment whether Louisiana has failed to comply. The State could act earlier, but has not claimed to do so. In this situation, the State is free until July 1, 1969 to distribute its funds in accordance with the Social Security Act and the implementing Federal regulations without regard to section 402(a)(23).

This does not excuse Louisiana from complying with section 402(a)(23) by July 1, 1969, nor does it lessen in any way what Louisiana must do to comply with that section. If Louisiana has reduced ADC payments by 10% so that a family which would have received the maximum payment of $163 per month receives $147 instead, the maximum figure which must be proportionately adjusted in response to section 402(a)(23) would still be $163. A State cannot reduce its maximum after January 1, 1968, and then adjust the reduced maximum. This would be an obvious evasion of section 402(a)(23) and would not constitute compliance with that section.

When Louisiana does seek to comply with section 402(a)(23), it cannot have a reduction in payments in the manner specified in the State agency's Memorandum No. 68-163, October 9, 1968 and Memorandum No. 68-169, October 15, 1968. Even if Louisiana's ADC funds are inadequate, the State will not be able to have a percentage reduction of its *payments*. For families receiving payments which are limited by the maximum, such a reduction in payment is a direct reduction of the maximum. To adjust maximums on

the one hand and to reduce them on the other would be an outright nullification of, and failure to comply with, the requirements of section 402(a)(23), and would not constitute compliance with that section. A reduction of this kind is not what is meant by a ratable reduction in the third sentence of the Federal regulation or by a percentage reduction in the discussion in this brief. The allowable reductions there referred to would be applied in relation to the standard of need and not in relation to payments which had already been limited by arbitrary maximums. The fourth sentence of the Federal regulation is designed to preclude reductions applied to maximums.

We assume for now that Louisiana will comply with section 402(a)(23), and that its ADC funds will be sufficient for payments on the basis of the updated standard of assistance and the proportionately adjusted maximums.

CONCLUSION

In this brief, we have discussed only those aspects of this case which involve provisions of the Social Security Act and the implementing Federal regulations. We have not expressed any views on the constitutional issues or the applicability of title VI of the Civil Rights Act of 1964.

We have concluded that, at the present time, Louisiana's 10% reduction in AFDC grants does not violate any provision of the Social Security Act or the Federal regulations. The fact that Louisiana has not reduced payments under any of its other public assistance programs does not raise any question. Each State plan or program is judged on its own for conformity with the requirements of the Act and the Federal regulations.

Looking at Louisiana's ADC program by itself, we note that, in general, the level of payments is a matter within the State's discretion. This general principle has been qualified by enactment of section 402(a)(23) of the Act, but that provision requires only that the State take certain actions by July 1, 1969. This deadline has not yet arrived, and Louisiana has not purported to comply. Therefore, it is too early to judge whether Louisiana has complied with section 402(a)(23). There is nothing in the language or history of that provision which precludes Louisiana from reducing ADC payments at the present time, but such a reduction does not lessen what Louisiana must do to comply with the statutory requirements by July 1, 1969.

To comply with section 402(a)(23), a State must update its standard of assistance (or standard of need, or budget) for the ADC program to reflect fully changes in living costs since the standard was last priced before January 2, 1968. In addition, any maximums which the State imposes in its ADC program must be proportionately adjusted. However, if the State cannot meet need in full under the adjusted standard, it may make ratable (or percentage) reductions in relation to the standard of need (either before or after income of the family is deducted). Nevertheless, the State may not make ratable reductions of its payments which have already been limited by arbitrary maximums. This would be an evasion of the requirement that maximums must be adjusted proportionately to the adjustment of the standard of assistance. Accordingly, a reduction such as that made by Louisiana in its ADC payments, which was applied to the maximums rather than to the standard of need (or the budgetary deficit), would not be in compliance with section 402(a)(23).

Hitherto, under the provisions of the Social Security Act and the division of authority between the Federal and State agencies in the administration of the public assistance programs, the States have been free to set their own standards of assistance and level of benefits. Contrary to Louisiana's argument, section 402(a)(23) is an exception to this general principle and States must comply with the requirements of repricing their standards and adjusting their maximums by July 1, 1969. However, contrary to plaintiffs' argument, section 402(a)(23) means only what it says, and leaves the States free to use other mechanisms (i.e., ratable reductions) for determining the level of benefits, even though as a result the repricing of standards may not be fully passed on to ADC recipients in the form of proportionately adjusted payments.

The conclusion that the proportionate adjustment of maximums does not preclude ratable reductions results inescapably from an examination of all relevant factors—the internal language of section 402(a)(23), the legislative history of that provision, and the latitude otherwise allowed to the States in determining the standard of need and level of benefits. Section 402(a)(23), when applied as it reads, has significant effects on the ADC program, and encourages a cost-of-living increase in ADC payments by

July 1, 1969. It does not, however, guarantee such an increase.

Respectfully submitted,

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[Appendices A and B omitted in printing]

H.E.W. Brief in *Jefferson, et al.* v. *Hackney, et al.*

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA-3-3012-B

RUTH J. JEFFERSON, *et al.*,

Plaintiffs,

—v.—

BURTON G. HACKNEY, *et al.*,

Defendants.

BRIEF OF ROBERT H. FINCH
SECRETARY OF HEALTH, EDUCATION, AND WELFARE
AS AMICUS CURIAE

CONTENTS

I. Statement

The case under consideration involves a complaint filed by recipients of aid to families with dependent children (AFDC) against the Texas Department of Public Welfare, and certain employees of that Department, which administers the aid program. The complaint arose from an administrative action by which payments to recipients in the program were reduced. The program for aid to needy families with dependent children consists of cooperative efforts of the federal and state governments as contemplated in Part A of Title IV of the Social Security Act. 42 U.S.C. § 601 to § 610.

The Social Security Act sets forth certain requirements to which individual states must respond if they are to avail themselves of federal financial participation in their programs of aid to families with dependent children. Federal administration of the pertinent part of the Act rests with the Secretary of Health, Education, and Welfare. Regulations promulgated by the Secretary afford further guidance and direction to the participating states with respect to the meaning and intent of Congress as expressed in Title IV of the Social Security Act.

Complainants allege: that Article 3, Section 51a of the Constitution of the State of Texas denies them equal protection of the laws as required by the Constitution; that actions of the Texas Department of Public Welfare in reducing benefits are based upon race or ethnic discrimination and contravene the Constitution of the United States; that reduction of benefits in the absence of legal, reasonable or rational standards constitutes a taking of

property without due process of law as required by the Constitution of the United States, that reduction of benefits by the Department of Public Welfare violates the Social Security Act; and that Article 3, Section 51a of the Constitution of the State of Texas is contrary to both the Social Security Act and the Constitution of the United States.

We call to this court's attention the fact that there are two cases in which decisions have been issued which deal with certain of the substantive issues in this case.

The first, *Lampton* v. *Bonin*, was heard by a three-judge Federal district court in New Orleans. That case involved percentage reductions of assistance payments in the State's program of Aid to Families with Dependent Children prior to July 1, 1969, without any comparable cuts in its public assistance programs for various categories of needy adults, and also included a challenge to the Federal regulation implementing section 402(a)(23) of the Social Security Act (42 U.S.C. 602(a)(23)), which specifically permits certain percentage reductions. The Department of Health, Education, and Welfare submitted an amicus brief (copy attached as Exhibit A) which addressed itself to the two issues described above. The district court, in a 2-1 decision (copy attached as Exhibit B) held that the State's various public assistance programs authorized by separate titles of the Social Security Act were independent of each other, and that differences in payment from one program to the next did not deprive persons of the equal protection of the laws. The majority held that the question of whether section 402(a)(23) permitted a State to make certain percentage reductions after July 1, 1969, and the related question of whether HEW's regulation

permitting such action were valid, was not ripe for adjudication. The court retained jurisdiction so that, depending upon the action of the Louisiana legislature and State welfare agency, it could decide these questions if it should become necessary. The dissent was of the view that the case could be adjudicated, and concluded that Louisiana could not adopt percentage reductions and that HEW's regulation was invalid. This opinion will be discussed at greater length below.

The second case which considered related questions is *Rosado* v. *Wyman*, in the Eastern District in New York. New York State enacted legislation which, effective July 1, 1969, would have replaced its previously highly individualized standards of need (including extensive schedules of special need items and variations according to ages of children in the family) and full payment of that standard, and would have provided for a flat statutory maximum on grants according to the size of the family.

The district court entered a preliminary injunction against the State welfare agency, enjoining them from taking irreversible action to implement the new law. In order to assist the Court of Appeals, should an interlocutory appeal be taken, the court set out its tentative conclusions which supported the injunction. It concluded, in a lengthy opinion (copy attached as Exhibit C) that because the new law resulted in lower payments to a substantial number of recipients, it was inconsistent with section 402(a)(23), and the court also expressed its opinion, relying heavily on the *Lampton* dissent, that the Federal regulation permitting certain percentage reductions was also invalid for the same reason. This opinion will be discussed at greater length below.

This brief amicus curiae is filed in response to the request of the court and describes the Secretary's position on the following issues: (1) the separateness of the various public assistance titles of the Social Security Act and the State programs operated pursuant thereto; (2) the Department's interpretation of section 402(a)(23) of the Social Security Act, as evidenced by its implementing regulation; and (3) the validity under the Social Security Act of the implementation by the Texas welfare agency of section 402(a)(23). This brief will also comment on these portions of the *Lampton* dissent and the *Rosado* opinion which conflict with the Secretary's interpretation of section 402(a)(23). No comment was sought or is made relative to those issues arising under the Constitution of the State of Texas or the Constitution of the United States.

II. Argument

A. *The provision by a State of grants in its AFDC program which are lower than these provided in its other Federally-funded assistance programs does not violate the Social Security Act.*

[This argument has been deleted in printing.]

B. *Section 402(a)(23) of the Social Security Act does not require increased assistance payments in the AFDC program.*

Under section 402(a)(23) of the Social Security Act, State AFDC plans must

> "(23) provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in

living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted."

The implementing Federal regulation reads as follows:

"In the AFDC plan, provide that by July 1, 1969, the State's standard of assistance for the AFDC program will have been adjusted to reflect fully changes in living costs since such standards were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted. In such adjustment a consolidation of the standard (i.e., combining of items) may not result in a reduction in the content of the standard. In the event the State is not able to meet need in full under the adjusted standard, the State may make ratable reductions in accordance with subparagraph (3)(viii) of this paragraph. Nevertheless, if a State maintains a system of dollar maximums, these maximums must be proportionately adjusted in relation to the updated standards." 45 CFR 233.20(a)(2)(ii), 34 F.R. 1394 (1969).

In essence, for purposes of this case, the regulation requires that a State must update its standard of assistance for the AFDC program to reflect changes in living costs, and any dollar maximums imposed by the State on AFDC payments must be proportionately adjusted. If the State's funds are insufficient to meet need in full under the adjusted standard of assistance, the State may make percentage reductions in payment in relation to the adjusted standard (not in relation to any dollar maximums).

The plaintiffs, the *Lampton* dissent, and the *Rosado* decision take the position that section 402(a)(23) requires that standards must be updated and *payments* must be proportionately increased. In their view, to allow a State to introduce percentage reductions or to lower the percentage where such a reduction method is already in use nullifies the effect of section 402(a)(23) and is contrary to the Act.

We submit that the Federal regulation is completely in accord with the words of the statute and the intent of the Congress in enacting it.

1. The words of the statute.

The *Lampton* dissent, upon quoting section 402(a)(23), observes at once that "this statute requires the states to increase ADC payments" (p. 2). This is the premise and the essence of the entire dissent. The *Rosado* decision, similarly, states at the beginning of its discussion of the meaning and effect of section 402(a)(23) that this provision requires that the "level of benefits" be adjusted to reflect changes in living costs (p. 46). Thus, both of these opinions essentially view section 402(a)(23) as *if* it read:

> (23) provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and [any maximums that the State imposes on] the amount of aid paid to families will have been proportionately adjusted. [Deletion bracketed.]

Had the Congress wished to require that payments must be increased proportionately to the rise in living costs, it

obviously would have deleted the bracketed words, or otherwise expressed the intended result. Instead, section 402 (a)(23) requires that "maximums" on payment be adjusted, but very definitely does not require that all payments must be increased, or that the level of benefits must be increased.

Both the *Lampton* dissent and the *Rosado* opinion appear to recognize the distinction between standards of assistance on the one hand and payment on the other. Thus, any requirement for increase in payment must be found in the latter part of section 402(a)(23), which speaks of "maximums." Both these opinions take the view that the term "maximums" in some way includes percentage reductions. Yet both opinions seem to agree that the words of the statute do not make sense when applied to percentage reductions. If a State has a percentage reduction, and updates its standard of assistance, the increase will be passed along to the beneficiaries if the percentage reduction remains the same. If the percentage reduction were "proportionately adjusted", the result would be an increase in payment much greater than the increase in living costs. *Lampton* brief, Exhibit A, pp. 20-21; *Lampton* dissent, Exhibit B, pp. 15-16 and footnote 17; *Rosado* opinion, Exhibit C, pp. 54-55, 57-58.

The term "maximums" has had a rather settled meaning in the public assistance programs as applying to dollar maximums. *Lampton* brief, Exhibit A, pp. 23-24; *Rosado* opinion, Exhibit C, p. 49.

Without further belaboring the point, it seems perfectly clear that the *words* of section 402(a)(23) require only an adjustment of maximums. They do not require an adjust-

ment of *payments*. They do not require or preclude any change in relation to percentage reductions.

2. The intent of the Congress.

The *Lampton* dissent and the *Rosado* opinion, in effect, take the view that the statute should not be read literally, since this would give results contrary to the intent of the Congress in enacting the provision. We submit that the clearest evidence in this regard is the virtual silence of the Congress about the meaning of section 402(a)(23), thus leaving the words of the provision to speak for themselves. Moreover, such more remote aids to construction as exist point to the same result as does a literal reading of the provision, namely, that the Congress did not impose upon the States a mandatory requirement that AFDC payments must be raised.

a. Direct legislative history.

As set forth in HEW's *Lampton* brief, Exhibit A, pp. 9-11, the legislative history of the enactment of section 402(a)(23) gives no amplification of what the Congress may have intended. This provision was contained in section 213(b) of P.L. 90-248. The committee reports concerned themselves almost exclusively with section 213(a), a relatively minor amendment to the programs for the aged, blind and disabled. The committees apparently considered section 213(b) to be of even less moment. The court in *Williams* v. *Dandridge* (D. Md.), opinion of February 25, 1969, (this opinion appears as an attachment to the *Lampton* brief) discussed at some length (pp. 15-20) the lack of Congressional explanation about section 402(a)(23).

b. *Other proposed amendments on related subject matter. Cost factors.*

The *Rosado* opinion discusses in detail other proposals for amendment of the public assistance titles on the subject of need standards, cost of living, and amount of payment. The opinion concludes that section 402(a)(23), as proposed by the Senate, was a compromise. Exhibit C, p. 51. However, while section 402(a)(23) deals with some of the same subjects as the other proposals, the differences are much more striking than the similarities. For one thing, the other proposals were not enacted; the present section 402(a)(23) is what the Congress voted. The other proposals were explicit as to their effect on payments. Moreover, the resulting costs were recognized to be sizable, and provision was made for meeting these costs. When section 402(a)(23) was enacted, the cost estimates did not reflect anything for this provision. *Lampton* brief, Exhibit A, pp. 10-11, 24-26.

Perhaps most striking was the refusal of the Senate to enact an actual cost-of-living increase in payment of $4 per month for each AFDC recipient. It was estimated that this amendment would cost $79.4 million annually in Federal funds and $135.6 million annually in non-Federal expenditures. The Senate was unwilling to impose this financial burden. Quite clearly, the Senators seem to have understood that the proposed section 402(a)(23) did not guarantee that AFDC recipients would receive increased payments. *Lampton* brief, Exhibit A, p. 27.

c. *Section 402(a)(23) as an exception to State options on level of payments.*

This specific plan requirement for adjusting need standards and any maximums which a State might impose

must be considered in the context of the general principles applicable to standards of need and amount of payment in the public assistance programs.

> "There is no question that States have considerable latitude in allocating their AFDC resources, since each State is free to set its own standard of need and to determine the level of benefits by the amount of funds it devotes to the program." *King* v. *Smith*, 392 U.S. 309, 318-319 (1969).[1]

Prior to the enactment of section 402(a)(23) this statement was true without exception. There is nothing in the legislative history of that section to indicate that the Congress intended to withdraw from the States their basic authority to determine the total expenditure they wished to make for AFDC. Therefore, the fact that section 402(a)(23) clearly represents a departure from the traditional Federal-State allocation of authority provides all the more reason to give effect only to its clear and unambiguous command. Any further derogation of a clear and long-established principle, recognized and accepted by the Supreme Court, would hardly be warranted without statutory text or clear legislative history to support such action.

d. *The role of legislators and States.*

If section 402(a)(23) did in fact inescapably require States to increase the level of AFDC payments, this would

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[1] The court's opinion made no reference to section 402(a)(23). For purposes of *King*, a general statement of the States' role was sufficient. Moreover, although section 402(a)(23) was in effect at the time of the *King* decision on June 17, 1968, the deadline of July 1, 1969 was over a year away. The implementing Federal regulation had not yet been published. The belated general awareness of section 402(a)(23) is also reflected in the supplemental opinion in *Williams* v. *Dandridge*.

have necessitated large expenditures of additional Federal, State and local funds. If the estimates for the $4 per recipient increase which the Senate turned down are applicable here, the total cost would be in excess of $200 million dollars, with almost two-thirds of this amount in non-Federal funds. A required outlay of this magnitude, in derogation of the usual latitude of the States to set their own level of benefits, would, in normal course, have resulted in remonstrances from some States, and opposition by various Congressmen. In short, section 402(a)(23) would have become very controversial. The fact that it was given almost no attention reinforces the conclusion that it was not viewed as imposing on the States the expense of actually increasing AFDC payments.

3. The Federal interpretation.

In this context, the deference to be given the Federal interpretation of the statute is particularly pertinent. We are dealing with a statute with words that are clear on their face, and which raise doubt only because they accomplish a limited result. It is not unnatural to wonder whether the Congress did not intend more. The Federal agency, which perforce worked closely with the Congressional committees, with the individual Representatives and Senators, with the States and with all the other individuals and organizations involved in the legislative process, is in a position to know which provisions were considered important and far-reaching and which were of lesser significance.

In the present case, this involvement of the Federal agency in the legislative process served only to reinforce the conclusion derived from the words of section 402(a)(23), from the absence of direct legislative history, and

from the effect of the other factors which we have been discussing in section II-B of this brief. Congress meant what section 402(a)(23) says, and no more than that. This is not a case where the Federal regulation is alleged to go beyond the words of the statute. Rather, the complaint is that it does no more than the words of the statute require. In such a situation, the fact that the Federal agency did not seek to impose any greater burden on the States than the Congress did deserves particular respect.

Both the *Rosado* opinion and the *Lampton* dissent state that HEW's regulation is contrary to the intent of the statute. But that begs the question. In the absence of direct legislative history, the intent of the statute is unclear. Deference is due to the Federal regulation when it carries out the words of the statute, which are further supported by the Federal agency's understanding that these words, taken literally, indeed represent the intent of the Congress.

C. *The Texas plan amendment is consistent with the Social Security Act and the implementing regulation.*

The case which is currently before this court for decision presents a concrete factual situation. Thus, the court can consider section 402(a)(23), as interpreted by HEW in its implementing regulation, and the results which flow from that interpretation as evidenced by the new policies recently adopted by the Texas welfare agency.

Neither the *Rosado* nor the *Lampton* case presented an actual instance in which a State had updated its standard of need and then, because of limitations on its resources, effected a percentage reduction of that standard in order to determine actual payments. This lack of a concrete case was the precise reason why the majority in *Lampton* de-

clined to adjudicate the question of what courses of action were available to Louisiana consistent with the Social Security Act. In *Rosado,* while it is true that the legislature had acted prior to the initiation of the suit, the challenged action did not involve the percentage reduction of an adjusted standard of need in order to compute actual payments. Rather, the New York legislation imposed flat dollar maximums. The court itself recognized that this was the case and stated: "The validity of the escape route for section 402(a)(23) [the "ratable" or percentage reductions] supplied by the regulation is thus technically not before the Court." Exhibit C, pp. 56-57.

Because Texas has at this point taken the necessary action in response to section 402(a)(23), and its policies have been submitted to HEW as an amendment to its AFDC plan and have been approved by the Federal agency, it is possible in this case to describe with specificity the effect of the plan amendment on the plaintiff-AFDC beneficiaries and demonstrate the affirmative results which result therefrom under the Federal agency's interpretation of section 402(a)(23).

The Texas plan amendment effectuating section 402(a)(23) is attached as Exhibit D. It was issued by the defendant Commissioner, State Department of Public Welfare on February 28, 1969, as "Office Memorandum E-430" and became effective May 1, 1969. This issuance contains instructions to field staff and reflects the following significant changes in the plan:

1. An 11% upward adjustment is made in the State's standard of need to reflect increases in the cost of living (Exhibit D, p. 4).

2. The flat dollar maximums on the amount which could be paid to families are abolished (Exhibit D, p. 6).

3. Directions are given pertaining to the computation of assistance payments in AFDC (Exhibit D, pp. 5-6). The family's total needs are computed according to the prescribed standard. Then, the amount of full need is multiplied by the percentage of need which the State will meet. The same percentage is applied in all AFDC cases, regardless of the size of the family. This operation gives a figure termed "recognizable needs." Any net income the family may have is next deducted (subject to certain limited Federal and State provisions on exemption of income not in issue here) and the resulting figure represents the assistance payment which the State will make.

As stated above, E-430 has been approved by HEW as meeting the requirements of Federal law and regulations. This policy, which incorporates a percentage reduction which is understood to be 50% currently, has several important results when contrasted with the system previously in effect in Texas. The "dollars and cents" effects of the new policy, in contrast to the prior system, when applied to hypothetical families of varying sizes are set out in table form as Exhibit E. A summary of those tables shows the following:

Mother (Caretaker) & 3 Children

1968 Budget	8-1-68 Pmt.	9-1-68 Pmt.	5-1-69 Budget	5-1-69 Pmt.
$164.00	$114.00	$102.00	$197.00	$98.00

Mother (Caretaker) & 5 Children

1968 Budget	8-1-68 Pmt.	9-1-68 Pmt.	5-1-69 Budget	5-1-69 Pmt.
$212.00	$135.00	$123.00	$253.00	$126.50

Mother (Caretaker), Disabled Father & 8 Children

1968 Budget	8-1-68 Pmt.	9-1-68 Pmt.	5-1-69 Budget	5-1-69 Pmt.
$320.00	$135.00	$123.00	$393.00	$196.50

As reflected in Texas' action, the implementation of section 402(a)(23) of the Social Security Act had significant effects. Budgets for families of all sizes were increased, reflecting rises in living costs. The new budget levels give better recognition to what a family needs for subsistence. Maximums on payments were abolished, thus removing entirely this arbitrary feature of the AFDC program, which particularly oppressed large families. The funds available for the program were then divided among all eligible individuals, to meet the same proportion of the needs of all. Some families received larger payments than before, some received smaller payments. Texas' failure to pay full need is unfortunate, but it does not violate section 402(a)(23) of the Social Security Act, which deals only with standards of assistance and maximums on payment, and does not purport to deal with the much broader problem of adequate funding of the AFDC program by a State.

Respectfully submitted,

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